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FOREWORD

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June, 1964 WILLIAM S. HEIN

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Patent Law and Psychology.

HERBERT POPE.

It is a generally accepted doctrine of the Patent Law, as developed by the United States courts, that over and above the necessity of showing novelty and utility as patentable requisites in connection with a device or process, it is incumbent upon the applicant to make it appear that his product is the result of "invention," which is interpreted to mean a "creative mental conception" as opposed to "ordinary reasoning." "To be patentable, a thing must not only be new and useful, but must amount to an invention or discovery."[1] The precise formulation of this notion as a distinct and separate requirement for patentability, is generally understood to have been made in United States Supreme Court cases during the years from about 1880 to 1885, though it is not difficult to find language pointing to the same result in earlier cases. Mr. Justice Story, in Earle v. Sawyer, 4 Mason, 1, a case often referred to, which was decided in 1825, vigorously controverted the idea, and it may well be that the language used by him in that case had much to do with delaying the general acceptance of a distinction easily suggested, perhaps, by the wording of the statutes. "The law looks to the fact, and not to the process by which it is accomplished," gives briefly but accurately the general position taken by Judge Story. Mr. Robinson, on the contrary, in his well known treatise published in 1890, contends that an invention possesses certain necessary and unchangeable attributes which have only recently been clearly apprehended by the courts. He says: "An invention is the effect of an inventive act, and it has been by passing from the study of the invention—the effect, to that of the inventive act—its cause, that the great progress in our modern understanding of the subject has been achieved."[2] It will be interesting, then, to inquire how much advance, if any, has been made by the courts in ability to recognize the existence or non-existence of patent-

(1) May v. County of Fond du Lac, 27 Fed. Rep. 695.
(2) Vol. 1, page 115, Robinson on Patents.

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ability in alleged new results by an examination of the "cause." The origin in the mind of the patentee, of the "effect," the supposed patentable product.

The Constitutional provision upon which all the patent laws of the United States are founded gives Congress the power, "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." It is worth noticing, in the light of distinctions sometimes made on account of the wording of the statutes, that in the language of the Constitution "inventors" are considered to make "discoveries," and no difference is suggested between inventions and discoveries. Section 4886 of the Revised Statutes reads: "Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his applicaion, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, obtain a patent therefor." A similar use of the words "invented or discovered" was made in the acts of 1836 and 1790.

It would not be worth while to examine with any attempt at exhaustiveness the precise language used by the courts in the many cases in which the question of patentability has been considered; but it might be well to notice a few of the earlier cases in which the language used by the courts agrees very well with that used by Mr. Justice Story in the case of Earle v. Sawyer, already referred to. Mr. Justice Nelson, for instance, in McCormick v. Seymour, decided in 1851, 2 Blatch. 240, referring to the act of 1836 says: "Novelty and utility in the improvement seem all that the statute requires as a condition to the granting of a patent. If these are made out to the satisfaction of a jury, then the subject is patentable, and the inventor is entitled to the protection and benefit of the statute. Otherwise, he is not. This is, perhaps, the only general definition that can be given of the subject of a patent, and it is the only one that the law has given for our guide."

Mr. Justice Curtis states the same doctrine in his charge to the jury in Forbush v. Cook, 2 Fisher, 288: "The true inquiries for you to make in this connection are, whether the combination made by Crompton was new and useful? If it was a new and useful combination within the meaning of the patent law, it was the subject-matter of a patent, and is not important whether it required much or little thought, study or experiment to make it, or whether it cost much or little time or expense to devise and execute it." In Middletown Tool

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Co. v. Judd, 3 Fisher, 141, decided in 1867, Judge W. D. Shipman used this language: "Whenever a change or device is new, and accomplishes beneficial results, courts look with favor upon it. The law, in such cases, has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device."

The language quoted from this case is referred to by Judge Nathaniel Shipman in Celluloid Manufacturing Co. v. Comstock & Cheney Co., 27 Fed. Rep. 360, decided in 1886, as being a typical expression of the earlier views of the courts on the subject, which have now to be modified "in view of the recent judicial statements of the requisites necessary to cause a new and useful improvement to be a patentable invention." Some of these "recent judicial statements" are in the case of Hollister v. Benedict & Burnham Manufacturing Co., a case we shall refer to later, in view of which Judge Shipman says: "It must be seen that this decision makes independent evidence of the existence of inventive skill, apart from inferences of such existence which may be drawn from novelty and utility, to be of greater importance than has been understood heretofore."

One of the first of the series of cases in the United States Supreme Court, usually referred to as insisting upon the importance of the mental act of invention, is that of Pearce v. Mulford, 102 U. S. 112, decided in 1880. The language of the court in this case is in reality not much stronger than that used in many earlier cases, and looking at the opinion as a whole it is clear the court considered that the objection to the claim of the patent in question could be properly stated as a want of novelty. The words usually quoted from the opinion in this case are as follows: "But all improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates."

This language is quoted by the court the next year in the Packing Company cases, 105 U. S. 566, but the distinction is not made use of there, because it is possible for the court to say, "But we think there is nothing new in the process covered by the patent under consideration." The following year, 1882, in the case of Atlantic Works v. Brady, 107 U. S. at pages 199 and 200, Mr. Justice Bradley used language which cannot be everlooked, and which has been since referred to repeatedly with approval. "The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such

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development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention." It will be noticed that the language of this case, so far as it actually goes, is in no respect out of harmony with the doctrine of the earlier cases. Coming when it did, it was made much of to support the view that an apparent exercise of the so-called "inventive faculties" must appear.

The next case particularly worthy of reference is that of Hollister v. Benedict & Burnham Manufacturing Co., 113 U. S. 59, decided in 1885, and often referred to as a leading case upon the subject, because it purports, in the language of the head-note, and is considered by later cases, to hold specifically that, "novelty and increased utility in an improvement upon previous devices do not necessarily make it an invention." Yet it is important to notice that Mr. Justice Matthews finds the thing in question here "new" only "in the sense that it had not been anticipated by any previous invention." As to its untility, he says: "Such an increased utility, beyond what had been obtained by devices previously in use, in cases of doubt, is usally regarded as determining the question of invention. But in the present case we are not able to give it such effect." And the conclusion of the court is that the new idea "seems to us not to spring from that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what had not before existed, or bringing to light what lay hid from vision; but, on the other hand, to be the suggestion of that common experience, which arose spontaneously and by a necessity of human reasoning, in the minds of those who had become acquainted with the circumstances with which they had to deal." Or again: "It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the crea-

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tive work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

A little later in the same year it was said by the court in Thompson v. Boissellier, 114 U. S. 1: "So, it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery."

Probably the first question that occurs to one after reading these statements is in regard to the exact nature of this required mental act, and the sort of independent evidence of its existence a court would consider necessary or sufficient. And then one may perhaps wonder if, supposing it were really possible to show that the result in question was the product of a creative act on the part of the particular individual, the establishment of that fact would be of any assistance in determining the inventor was entitled to a patent? We can find little in the cases that will satisfy us on these points, and if we would see what can be done in the way of elaboration and analysis of this psychological doctrine, we must turn to treatises such as those of "Robinson on Patents" and Merwin on the "Patentability of Inventions."

Robinson, as we have seen, considers that, "by passing from the study of the invention—the effect, to that of the inventive act—its cause" great progress has been made in the understanding of the subject of patentability, and he examines the "mental part of the inventive act" at great length. "The creative, not the imitative faculties," he says, are employed in this act. Invention "involves the spontaneous conception of some idea not previously present to the mind of the inventor." Industry, judgment, mechanical skill, etc., are altogether distinct and apart from "creation," and no matter how much there may be of the former, they all go for nothing unless "creation" also plays a part in the production of things new and useful.

Before attempting a criticism of this doctrine, it will be of advantage to review Merwin's treatment of this subject, because he accepts so confidently the importance and necessity of the test of "invention," and follows out the suggestions of the cases to their logical conclusion. Defining invention,[1] he begins by saying that, "Invention is imagination; it is the very opposite of reasoning or inference; it is a single act of the mind; rather an instantaneous operation than a process." And he analyzes genius to be, "first, the absence of conscious effort; second, instantaneous operation." This imaginative, instantaneous act is the "inventive part" of the mental process, and

(1) Patentability of Inventions, page 22.

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whenever invention occurs, at sometime, somewhere, there must be this "grasping of a truth not attained by reasoning," no matter how much reasoning and industry may be added thereto. He seems to think that, unless we find the existence, or the possibility for the existence, of a particular mental process in the mind of the inventor, there is no escape from calling everything new which differs outwardly in any respect from anything that has existed before. That the whole quarrel is over what shall be considered "new" is evident by what he says on page 17: "It is plainly, however, the correct reading of the statute to give to the words 'invented or discovered' their ordinary meaning, rather than to import it into the word 'new,' thereby rendering the words 'invented or discovered' superfluous." However, "Looking at the matter in another way," he admits, "it may be said that the words 'invented or discovered' define the kind of newness called for by the statute." But he prefers to say: "Whatever is invented or discovered must be new; but a thing may be new and yet neither invented nor discovered." He appears to overlook the fact that, if this last statement be true, then the word "new" in the statute is made superfluous, and so the statute is necessarily redundant in one respect or the other.

But as a matter of fact, and as Merwin himself shows, a thing that is invented is not necessarily new. For instance, a person might create by an imaginative act a thing new to himself and find afterwards that it was an old device, or one obvious to others more experienced, and so not a new device in the eye of the patent law. Merwin admits this possibility of the invention of a non-patentable thing by some particular individual, "because he was ignorant, or because he had not the normal reasoning faculty, or because he had the imaginative faculty in excess, or from all these causes combined," and endeavors to save his theory by saying, "that the patentability of a given improvement must be determined by the manner in which it would ordinarily be arrived at, without regard to the manner in which it has actually been arrived at in a particular case." [1]

Now if all this be true, and if the question is as to what the "ordinary man would or would not do, then, in spite of Merwin's absolute statement that, "Reason would never lead one to the truths and ideas which are the objects of invention," it must be acknowledged that persons of exceptionally good reasoning powers might reason out a result that the "ordinary" man could not reach without the use of his "imagination," just as the "ordinary" man might be able to reason where a more ignorant man would have to "imagine."

And then, moreover, there are possibilities of chance and accident

(1) Patentability of Inventions, page 36.

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which must further limit the scope of "invention," and eliminate the opportunity for the exercise of the imagination in achieving a new result. Merwin admits that "a patentable invention might be the result of mere accident." (Page 44). But he shows himself equal to the occasion by making this further qualification of his rule. True, "The law cannot undertake to decide whether chance or thought has withdrawn an invention from its hiding-place. But the law does require that the thing to be patented shall be of such a character that, *supposing it to have been thought out*, and not chanced upon, it must be the result of inventive thought." (Page 45). Considering all qualifications, then, Merwin's rule for finding invention comes at last to about this: you must inquire if the given result could be achieved by a man of ordinary mind acquainted with the trade or art, in any other way than by means of a mental process which, at some stage, would involve an instantaneous act of the imagination, supposing him to think the matter out from the previous state of the trade as a premise, and to be helped in no way by chance or accident. It will not be true, after all, to say that the inventor, to be entitled to a patent, must not only produce something new and useful, but must also achieve his result by a "creative act of the imagination." That will be necessary only in case he is a man of ordinary mind, and is not aided at all by chance. Indeed, it may be he will not be entitled to a patent even though he has admittedly produced something "new and useful," and offers to prove that he reached his result by an act of the imagination, because, to be sure, the court, through its knowledge of psychology, may find that if he had been as smart as the "ordinary" man, or had not had the "imaginative faculty in excess," he might have reached the result by "pure" reason. The test is not what was, as a fact, but what might have been. This, then, is the conclusion, of the whole matter, and certainly, if we insist upon following it out, it appears to be logical enough. We may insist, if we like, after we have decided from the evidence that the "thing" is a patentable novelty, that the "creative faculties" were, or must have been, or at least would have been at work if the result had not been achived in some other way; but we must admit that any evidence competent to establish that fact is forever beyond the reach of the courts.

More recent cases indicate, perhaps, to some extent, a tendency to make more of the "novelty" consideration as containing the substance of the whole matter, as the frequent occurrence of the phrase "patentable novelty" seems to suggest; yet we find repeatedly the same insistence upon the necessity of finding an exercise of the inventive faculties. For instance, in Thomas Roberts Stevenson Co. v. McFassell, 88 Fed. Rep. 278, it was held that the "creative faculty requisite to invention"

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was not apparent, but this decision was reversed by the Circuit Court of Appeals[1] because the judges of that court were "not able to concur in the conclusion of the circuit court" that the construction in question "did not involve any exercise of the inventive faculty." There was a similar disagreement of courts in Clinton Wire Cloth Co. v. Hendrick Mfg. Co., 86 Fed. 137.

Mr. Justice Brown, speaking for the court in McClaim v. Ortmayer, 141 U. S. 419, 426, in discussing the meaning of the word invention, says: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not." Yet he still thinks it possible and necessary, in each particular case, to find that there has or has not been an exercise of "more than ordinary mechanical skill," although that conclusion cannot be attained "by applying the test of any general definition." Such language certainly makes strongly for the conclusion that, after all, the mental processes of the inventor are really of no assistance in determining the question of patentability, and that the finding by the court of an exercise of the inventive faculties is merely an additional conclusion, made after the question of patentability has been decided by means of other tests, for the sake of meeting the supposed requirements of the statute. This view of the matter is given further support by the still later case of Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 493, where it is held that a certain change in windmill construction "does not rise to the dignity of invention," although Mr. Justice Brown is willing to admit that the particular individual who thought of the change may have "exhibited inventive talent of a high order." That, however, was because he and all the other windmill men did not know enough about windmills. Otherwise the change would have been a very simple matter. As Merwin would have put it, they were just "ordinary" windmill men who had to go to the trouble of exercising their inventive faculties to help out their ignorance.

Some of the text writers have appealed to the psychologists in support of the theory of the courts, but it is doubtful if much comfort is to be obtained from them. As Prof. Dewey has said,[2] psychologists are bound to recognize "that there is no such thing as immediate knowledge. Any cognition is dependent; that is, it is *because of* some other cognition." And as to intuition he says (page 237): "Intuition is often conceived to mean a purely *immediate* act, or one taking place without the recognition of any relation of dependence. Intuition is defined in a way which opposes it to reasoning and excludes the latter.

(1) 90 Fed. Rep. 707.
(2) Psychology, page 220.

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* * * Something perceived by intuition is supposed to be just what it is by virtue of its own independent existence. We are in a position to recognize that there cannot possibly be intuition of such a kind. Every act of mind involves relation; it involves dependence, it involves mediation."

What psychologists sometimes call "association by similarity" is a process which, no doubt, plays a large part in the invention of new and useful things, and, for purposes of discrimination, a mind which works readily by such means may very properly be opposed to a mind of a more analytic type. What it is important for us to notice is that both these types of mind may be equally effective, and that it is not the object of the patent law to stimulate and reward one rather than the other. The patent law is concerned with new and useful *results*, and cares not at all of what kind of mind they are the product. It would be rash indeed for the law to treat the intuitional mind as a higher and more worthy type than the analytic mind, especially when we find the psychologists inclined to a conclusion just the reverse of this, so far as they care to make any distinction one way or the other. Prof. James says,[1] for instance: "Though it would be absurd in an absolute way to say that a given analytic mind was superior to any intuitional one, yet it is none the less true that the former *represents* the higher stage. Men, taken historically, reason by analogy long before they have learned to reason by abstract characters. Association by similarity and true reasoning may have identical results."

Certainly no court would listen for a moment to an attack upon an existing patent by a party who claimed that the patentee had attained his result, admittedly new and useful, by a purely reasoning process, proceeding by a series of inferences and experiments, without any logical break in the regular and persistent application of his mere mechanical knowledge and skill, to his final working idea; whereas, he himself had arrived at the same result by an independent, brilliant and spontaneously creative exercise of his imaginative genius. No court would consider an issue such as that, and yet, if the courts are concerned, as they claim to be, with the character of the mental processes involved in invention, they cannot fairly ignore such considerations. But once more it is evident that the tests employed by the courts to determine the existence of patentability are direced to the discovery of real and practical novelty, and have no tendency whatever to reveal mental processes.

There is no good reason, because a conclusion "pops," as we say, into the mind when we least expect it, or because we cannot trace readily its antecedents, to infer that the will has created in that instant

(1) Psychology, 2—page 363.

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an idea foreign to all other ideas previously in the mind, and that a process altogether unique and uncommon has then taken place. Such a mental operation is common enough in itself, and is by no means an indication of genius; that must be determined by the value of the result. We are all acquainted with the unconscious working of our minds to slight and trivial results as well as to good and desirable ends. Our individuality lies largely in our unconscious ways, and we do not become original at any moment either by much taking of thought, or, on the other hand, by virtue of any single unconscious mental operation altogether unique and entirely disconnected from the rational processes of the past. Originality is a characteristic of individuality, "has to do with the gradual organization of life as a whole,"[1] and is not evidenced by single operations of particular mental faculties. The man who produces and acts at a given time is an organized self, and the capacities that exhibit themselves unconsciously at any moment are the outgrowth of much conscious toil and effort in the past. The results of those past conscious endeavors have become mechanized and organized in the total self, which is now capable of responding to the suggestions and appeals of the environment without any disturbance or awakening of conscious activity and direction. So that, if we would trace the origin of a new and valuable idea in a particular mind we must look to the life of that individual as a whole and follow the growth and development of his volitional, intellectual and temperamental characteristics.

This view of the matter not only makes it plain that the psychological problem is beyond the province of the courts, but it shows that the search is vain because the object of it does not exist. It is a mere assumption to suppose that the word "invention" implies a distinct and definite psychological process, and that there must be somewhere an outward evidential sign of this inward imaginative working. As a matter of fact there is no mental process characteristic of invention. The ways of discovery and invention are as many as there are individuals, and it is not for the courts to say that one way is better than another. The courts must decide if the thing offered as new is in reality possessed of sufficient novelty and value to entitle the inventor to a patent. That is a practical problem of sufficient difficulty without the addition of an investigation in the field of psychology. It is interesting, no doubt, to observe that our courts have shared in the psychological enthusiasm of the past fifteen or twenty years, but as to the value of this particular investigation, we are forced finally to adopt the simple statement of Mr. Justice Story, "The law looks to the fact, and not to the process by which it is accomplished."

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(1) Royce, "Originality and Consciousness," page 258 of "Studies of Good and Evil."

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The Record of Court.

F. B. WILLIAMS.

It is the aim of this article to set forth briefly the more salient features of the common law relating to the record of judicial proceedings, and of the law of Ohio on the same subject.

It is obvious that when a given subject-matter has once been finally adjudicated, some effective means must be devised to prevent the same question from being raised again between the same parties, or their privies in a distinct proceeding, unless by way of appeal or proceedings in error. The former adjudication must be susceptible not only of proof, but of prompt and summary proof, to prevent vexatious delays; and that this proof will be forthcoming must be knowable in advance to a certainty, that there may be public confidence in the courts and in the utility of resorting to them. To these needs the record, as developed in our law, responds, and when the immense importance of its preservation, not only to litigants but to the general public as well, is understood, it ceases to be a subject for surprise that this memorial of the activity of our courts and of those of the mother country may be followed back almost without a break for over seven hundred years.

The record of judicial proceedings, according to our law, is an instrument not simply of evidence, but of absolute proof. It is "a memorial or monument of so high a nature, as it importeth in itselfe such an absolute verity, as if it be pleaded that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but only by itselfe."[1] That is to say, when the existence of the record is put in issue,[2] in the same court where it was made,[3] it is proved, and provable in no other way, than by its own production. This is to "bear record," and when it is understood that anciently the record was borne orally by the justices themselves, from memory or tradition, it will be seen that the act is final and conclusive.[4] It is not an evidential fact from which the court or jury may draw conclusions, but is in itself the finding of fact. Trial by record is, therefore, a mode of trial, coordinate with trial by jury; it differs from the latter in being a formal mode of trial, being similar in spirit to, though vastly more rational than, the other formal

(1) Co. Lit. 117b; Glanvil, lib. 9, cap. 8; Bracton, lib. 3, fol. 156; Britton, fol. 121. "For otherwise (as our old outhors say, and that truly), there should never be any end of controversies, which should be inconvenient." Co. Lit. 260a.

(2) If the record is not put in issue by the pleadings, but only by the evidence, a copy is admissible. Buller's Nisi Prius, ed. 1770, 226; Comyns' Dig., tit. Certiorari.

(3) Chamberlayne's Best On Evidence, sec. 485 and note 1, a good reference on the whole subject at common law; see also Greenleaf, sec. 513-522.

(4) On the ancient practice of "bearing record," see Pollock and Maitland's Hist. of Eng. Law, 1, 522; 2, 664, 666.

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modes of trial known to our old law, such as trial by ordeal, oath or battle. It is the only one of these ancient formal modes of trial still in use.[1]

Certain inferior tribunals in England and in a number of the states in this country have never possessed the privilege of record in this sense, and so have been styled courts not of record. Their proceedings are provable by evidence, just like any other disputed question of fact, and the matter is tried by jury.[2] If the former proceedings of such a tribunal have been written down, the best evidence rule is generally applied so as to require the production of the original writing unless lawful excuse can be shown for secondary evidence.[3] But this is far different from trial by record, inasmuch as the finding as to what the inferior court did do on the former occasion in question is still left to the jury, whereas neither jury nor verdict appears in trial by record proper. Where the proceedings of the inferior court have not been written down, any evidence of the character admissible to prove questions of fact in general, even oral testimony, may be resorted to.

While it is not desired to encumber this article with antiquarian research, it will serve a useful purpose to recall briefly the origin of this distinction between courts of record and those which are not so, since the terms are still in use, although the difference between the two classes of courts has, in Ohio and doubtless in most of the newer states, disappeared for most, if not all, practical purposes. The distinction is far older than the common law, and goes back to the origin, on the continent of Europe, of royal, as distinguished from popular, justice. The king's word, whether in the recitals of his charter or deed, or whether in the form of minute narrating his judicial decisions, is incontestible; so the record of his court proves itself.[4] The popular courts of ancient customary law had no such privilege; in England these were the old hundred and county courts, and the courts baron;[5] and while they practically disappeared some centuries ago before the march of royal jurisprudence, still their peculiarity in this, and in several other respects has survived to characterize various petty courts in modern England and in at least the older states of our country. So the origin of the distinction may be set down with certainty as Germanic; in the Roman and Canon law all courts, apparently, are what we would call courts of record.[6]

It would seem that in Ohio, and probably in most of the newer

(1) On the older modes of trial see generally Thayer's Prelim. Treat. on Evidence.
(2) Co. Lit. 117b; Greenleaf, sec. 513-522.
(3) 1 Greenleaf, ibid.
(4) Brunner, Deutsche Rechtsgeschichte, 2, 523; Poll. and Maitl., 2, 666.
(5) Co. Lit., 117b.
(6) c. 6, C. 7, 52; c. 7, 11, X. 2, 19; c. 11 in fine, X. 2, 23; Bayer, Der Gemeine Civil Process, 263 et seq.

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states, there is no court, using that term in its usual meaning as a forum primarily for litigation, which may now in any very useful sense be styled a court not of record. The justice of the peace in this state is required by statute[1] to keep a written record, and when it shows jurisdiction it "imports absolute verity."[2] Furthermore, where the jurisdiction of the justice is not made final by statute, and where the case is not appealable, error lies to his judgments, and that is one of the marks of a court of record.[3] It is true that the justice's court has no seal,[4] and is has been noted even in high places that he does not proceed according to the course of the common law.[5] But probably he does as nearly as do the petty courts anywhere, and as nearly as is desirable in this class of cases. Certainly the approximation to the course of common law procedure is tolerably close, and at all events there is no longer any special fitness in the term "court not of record." It would seem to be enough to refer to these courts simply as inferior ones, of limited jurisdiction.

From Anglo-Saxon times the English courts have sat by terms,[6] and this circumstance eventually came to have importance in connection with the record. It was not made up until the close of the term, and so during the term it was alterable, or rather the minutes were, without difficulty. After the term it was not possible to alter it at all, according to the rigid doctrine of the older common law. And so Coke: "During the terme wherein any judicial act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment or proof to the contrary."[7] The older courts did not shrink from carrying this doctrine out to its farthest consequence, as will appear from the following case from the Year-Books of 19 Henry 6, decided in 1440: "If a man levy a fine of lands by my name, I shall have no other remedy than a writ of deceit, by which I shall recover damages according to my loss."—Per Newton, C. J.[8] But by 1596, and so even before Coke wrote, it was thought that the fine might be vacated in such a case, doubtless on the ground of fraud on the court and owner,[9] and in 1601 the point was so

(1) R. S. sec. 594.

(2) Adair v. Rogers, W. 428; Stockwell v. Coleman, 10 O. S. 34, 401; State v. Daily, 14 O. 91, 98.

(3) Co. Lit. 117b. In the case of courts not of record a writ of false judgment lay at common law. *Ibid.*

(4) Hubbel v. Baldwin, W. 86.

(5) *Ibid.*

(6) Crabb's Hist. of Eng. Law, 33; Reeves' Hist. of Eng. Law, 1, 192; Dugdale, Orig. Jur., 89 et seq.; Spelman, Orig. of Terms.

(7) Co. Lit. 260a.

(8) 19 H. 6, 44, 93; Thayer's Cas. on Ev. 2 ed. 823.

(9) Hubert's Case, Cro. Eliz. 531.

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decided in Fermor's case.[1] In modern times the rigor of the law in this respect has been still further relaxed, mainly by statute, so that nowadays the record may, as a general rule, be altered, even after the term, so as to prevent frauds, correct unintended blunders, and even make amendments.[2] But during the term the record still remained entirely within the control of the court[3].

The common law practice of making up a distinct record in a roll or book by itself is, the writer understands, no longer followed in England nor in many of the American states.[4] Instead are used the files, i. e. the pleadings, process and other papers filed with the clerk, and the various docket and journal entries required to be made in the given jurisdiction. But Ohio, in common with several other states,[5] has always kept up the ancient practice, and the existing statutes are very specific in their directions to the clerk. The final record is, therefore, in this jurisdiction, to be kept quite distinct from the entries required to be made in calendars, dockets and journal. The latter are fairly contemporaneous with the business they refer to, are made partly by the judge, but mainly by the clerk, and have a more temporary character than the record proper. They are intended to facilitate the business of litigants, of the clerk and of the court, and also serve as material for making up the record proper. In all cases in the Common Pleas and Superior Courts (with the exceptions hereinafter noted), and in all cases in the Circuit and Supreme Courts of which they have original jurisdiction,[6] it is the duty of the clerk, after the case has been finally disposed of, to make up, in the vacation next after the term at which the cause was determined, a complete record of it in a volume by itself called "The Record."[7] At the next term it is the duty of the presiding judge to subscribe this record,[8] but this provision seems to be mandatory only, as the record would probably be held valid without such signature.[9] In a few cases where the making of a final record would not particularly serve anyone's convenience, it is not required. So where in a criminal case the indictment has been quashed or a *nolle prosequi* entered, or where a civil action has been dismissed without prejudice.[10] Furthermore, the parties may by agreement waive a

(1) Fermor's Case, 3 Co. 77b, 80; Thayer's Cas. on Ev., *ibid.*

(2) For the Ohio law see R. S. sec. 5354.

(3) Huntington v. Finch, 3 O. S. 445; Carey v. Kemper, 45 O. S. 93, 98; Niles v. Parks, 49 O. S. 370, are a few among many Ohio cases on the point.

(4) Black on Judg., sec. 124; Stimson v. Huggins, 9 How. Pr. (N. Y.), 86; Vail v. Inglehart, 69 Ill. 332; Stevison v. Earnest, 8r Ill. 513; Emery v. Whitwell, 6 Mich. 488; Myer v. Verner, 10 W. N. C. (Pa.) 138; Clark v. Depew, 25 Pa. St. 509; 20 Am. and Eng. Enc. 476.

(5) Black on Judg., *ibid.*; Ansley v. Carlos, 9 Ala. 973; Willard v. Harvey, 24 N. H. 344; 20 Am. and Eng. Enc. 476.

(6) Rules of the Supreme Court, 19.

(7) R. S. secs. 5332-3.

(8) *Ibid.*

(9) Comp. Osburn v. State, 7 O. (pt. 1) 212; Kinkead's Practice, sec. 211.

(10) R. S. sec. 5337. But in a case dismissed without prejudice either party may have a final record made up by tendering the clerk his fees therefor. R. S. sec. 5338.

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record in any case, and thus save expense,[1] a practice almost invariable in cases which are settled by the parties.

In those cases in which no final record has as yet been made up, and in those where none is required, the docket and journal entries, and even the files, may be used in lieu of the record, in criminal as well as civil cases.[2] But once the record proper is made up, nothing else will take its place,[3] unless it be subsequently lost or destroyed by fire, riot or civil commotion, in which case ample provision is made by statute for the use of the original files and entries and in short about any other material that may in fact be useful.[4]

What the record shall contain has been defined in detail by the legislature, although in most respects the statute is declaratory of the common law practice. It is provided that: "The record shall be made up from the petition, the process, the return, pleadings subsequent thereto, orders, judgments, and all material acts and proceedings of the court, but if items of account, or copies of papers attached to the pleadings are voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely."[5] It will be observed that no abbreviation is made without order of court, and that it is permissible only in the case of documents attached to the pleadings. All other papers that go in at all are spread on the record in full.

It is further to be observed that the record contains no mention of anything occurring at the trial, except when a bill of exceptions is filed in the Common Pleas or Superior Court. In the higher courts error cases are not recorded at all, *supra*. Our statute, to be sure, expressly prohibits the recording of evidence,[6] but more than that, is in practice excluded; so motions made at the trial, such as to arrest the evidence or to discharge a prisoner; likewise the arguments of counsel, all requests for instructions, the instructions actually given, in short everything that takes place at the trial clear up to the verdict. So far as appears from the record, the verdict follows immediately on the opening of the trial. This is all common law, and has been so from the time the plea rolls begin.[7] It is worth noting, and perhaps may set some things in a truer light, to recall the original reason for this sweeping exclusion

(1) R. S. sec. 5337.

(2) Young v. Buckingham, 5 O. 485; Noble v. Shearer, 6 O. 426, 427; Sutcliff v. State, 18 O. 469; Morgan v. Burnet, 18 O. 535; State v. Dawson, 6 O. 251, 253; Chapman v. Seely, 8 C. C. 179.

(3) Moore v. Brown, 10 O. 197.

(4) R. S. secs. 5339a (2)-5339e.

(5) R. S. sec. 5334.

(6) *Ibid.*

(7) Those extant go back to 1194. Poll. and Maitl. 1, 147. A good description of the ancient record may be found in 7 Harv. Law Rev. 266, in an article by Mr. L. O. Pike entitled: "An action at Law in the Reign of Edward the Third.—The Report and the Record."

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of all things said and done at the trial. It was simply because at the time our records begin, and for some centuries thereafter, there *was* no trial in our modern sense. The jury went almost, if not entirely, on its own knowledge,[1] and so the record of those times really omits nothing of importance. Although we have had a trial in substantially the modern sense, with the bulk of the case presented to the jury in the form of evidence, from the time of Henry the Eighth, to put the date at the latest, we have nevertheless maintained the old rule that the record shall not incorporate the proceedings at such trial. This is, of course, for new reasons that have arisen with the trial itself, and that are not far to seek. Not the most important one is this: to put the testimony and other evidence on record would be to encumber it unduly, and far more than double the expense to litigants and tax-payers. For, of course, where the costs cannot be collected, the expense falls on the county. It is notorious that the costs are seldom paid in divorce cases for instance, and yet one could scarcely find another class of cases so imperatively calling for record, in the interest of society as well as of the litigants. More important, however, is the consideration that what occurs at the trial, though it be of the utmost importance, nay absolutely necessary, to the decision of the case, is of the least importance for the purposes of permanent record. The record is kept, it will be remembered, chiefly in the interest of the parties themselves; this is seen in the provision allowing them to waive having it made. Now the parties are not especially interested in the preservation of the evidence; that was but the means to an end, and once the end is reached it is that end which they desire to perpetuate in legal memory. It fills their need that the record show what was decided and which way it was decided, and that all the necessary jurisdictional steps were properly taken. Consequently there are reasons for the continued exclusion of the evidence quite as strong as when there was none to exclude. Almost, if not all, the other proceedings at the trial are inseparably connected with the evidence, and so are excluded with it. To put these things in would be to perpetuate useless memorials, and among them the memorial of those errors of a certain kind that are committed far oftener than the law student suspects, and that are of much less importance than he can as yet realize.

It only remains to add (and that mainly for the student) that when a case is carried to a higher court because of some error alleged to have been committed at the trial, the evidence and all else material done and said at the trial, are, in the absence of statute, put on the record of the higher court. It is possible in our practice to do this only through the activity of one or both of the parties during the trial in preserving an accurate account of it, regularly by employing a stenographer. This documentary evidence is then cast in the form of a bill of exceptions, submitted to the opposing counsel, approved by the trial judge, and filed with the clerk of the higher court.

When that court has rendered judgment, and especially when it has rendered judgment of reversal, it would naturally seem as if the bill of exceptions should go on record, in order to explain what it is that has been decided. This suggests the observation that the record of

(1) See Thayer's Prelim. Treat. on Ev. on this whole subject.

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proceedings in error is of importance mainly to attorneys and to persons who, not being bound by the decision itself, contemplate similar proceedings. They are interested to know what is error and what is not. But to the litigants themselves proceedings in error are mere lawyers' squabbles; if they lead to a new trial they exhaust their importance by so deciding; if they do not, they only affirm what is already on record. In harmony with these considerations our law of Ohio does not require those courts whose business is almost entirely appellate, so the Circuit courts and the Supreme court, to make up a final record at all, except in the few cases in which they have original jurisdiction, and even here the requirement is by rule only. The needs of the legal profession are sufficiently met by reporting all such cases as are of general importance. On the other hand in case of reversal the mandates of those courts are required by statute[1] to set forth the reasons for such judgments of reversal, that the why and wherefore may be apparent. It is not apparent why the error cases in the Common Pleas courts have not been treated in the same way. These courts are to no inconsiderable extent courts for the correction of errors committed in the police and justice courts. Now on the one hand it is provided that bills of exceptions shall not be recorded in these courts unless so explicitly ordered,[2] while on the other hand there is no statutory requirement that the decisions of these courts in error cases shall set forth the reasons therefor. The reason for such decisions may be made more or less apparent in one of these two ways: either by spreading the bill of exceptions on the record, which is an expensive process, and one which, after all, leaves the reader in much doubt as to just which error assigned was made the basis of decision; or the court may be required to state its reasons briefly in the judgment. This latter mode is the only one quite satisfactory. It may be objected that this would entail too much labor for the busiest courts in our judicial system, and certainly for our more populous counties this is an objection to be carefully weighed; but even then its weight is diminished by the reflection that our Circuit Supreme court judges, who are also busy men, have time to do these things. It is true that by R. S. §6726 the Common Pleas and Circuit courts may be required to write out the grounds of reversal and cause the same to be filed, on the application of either party, but for the reasons above suggested this does not seem to be enough. It is seldom done, either through oversight or lack of interest. Nor is it a sufficient reason for not setting forth grounds of reversal in civil cases that the Common Pleas court retains such cases for a new trial.[3]

But this seems to be a fitting place to bring to a close an article of the limited extent suitable for these columns. Much might be said, and easily connected with the above, concerning the correction, amendment and alteration of the record (which three things are distinct), and of the making of *nunc pro tunc* entries, but these topics also admit very well of separate treatment.

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(1) R. S. sec. 6709, 6710.

(2) R. S. sec. 5334.

(3) R. S. sec. 6733.

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Editorial

In law schools, disputes between the faculty and the students on legal propositions are not unusual, and as they always tend to edify the parties concerned, they are considered highly desirable and meet with encouragement, but it is seldom that they ever become other than academic questions. As we are fortunate enough to have an exception to this rule arise in our midst, in the case of a student who was wholly unable to agree with the faculty on a point of law, it may not be out of place to refer to it here. The abstract proposition had such a personal application to the individual in question, that the courts of Cuyahoga County were called upon for a decision. As a result, the Circuit Court in the case of Koblitz v. The Western Reserve University, 21 C. C. 144, has handed down some interesting law pertaining to the relations of a student to his college. Although a number of other questions are involved and decided by the court, the discussion of the legal right of the faculty to expel a student, what constitutes sufficient acts of misconduct, and in what manner the right of expulsion must be exercised, is probably the most interesting part of the decision. The court held that the faculty, as a matter of custom and of law as well, were invested with the authority to discipline a student without the formality of a trial and although no rules exist in respect to the acts with which the student is charged, and if they have acted with "prudence, discretion and fairness" the plaintiff can have no standing in a court of law. In short, the decision of the faculty is only subject to review when there has been "unnecessary oppression and unfair dealing."

We shall not attempt to take up the opinion in detail, but it may be interesting to those who are personally acquainted with the plaintiff

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and who of their own knowledge may be entitled to pass upon the facts, to hear what the Circuit Court has found them to be, and their effect in law. "The testimony before us tends to show, and we think does fairly show, that the plaintiff's scholarship in the school has been poor, and that, while a student, during the year he attended the law school, he was twice arrested on criminal charges; that he carried a revolver and threatened to inflict violence upon a fellow student; he indulged in abusive language and disorderly conduct towards fellow students in and out of the school building; he was untruthful. When he was notified by the faculty to appear before them by reason of some of these offences for an examination, he said, in return of such notice, that he did not know whether he would go or not; that if they undertook to discipline him they would find they had a lawsuit on their hands, and the evidence shows that he was a disturbing element in the school and a very undesirable student. He denies many of these accusations, but not all of them. He bought a book from a fellow student and ascertained afterwards from one of the professors that it was not the latest edition and was not the edition they were using in the school, but that it would have served his purpose very well. Thereupon he clandestinely entered the building and the room of the student who sold him the book, and took from the room a book, not of the student who sold him the book, but from the student's room-mate, which book he proposed to hold until the money was refunded to him for the book that he bought. He convicted his fellow student without trial, and he inflicted a most unreasonable punishment, and when the faculty persuaded him to relent and desired him to mend his ways and reform his conduct, he informed them that if they undertook to discipline him they would find themselves with a lawsuit on their hands.

"It seems to us that such conduct from a young man, who has a fair mind and an honest purpose, is impossible, and we believe that the authorities were entirely right in refusing him admittance upon the second year."

The City of Zanesville vs. The Zanesville Telephone Co.

It is a fundamental proposition of our constitutional government, that the three co-ordinate branches, the legislative, the executive and the judicial should remain separate and distinct and exercise only those powers, which properly belong to their respective functions. This distribution of the sovereignty of the state has been deemed essential to the existence of free government, as it operates as a check or balance, preventing any one branch from arrogating to itself supreme and arbitrary power. This principle seems to be well recognized, but the determination of the question, to which branch does a certain power

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properly belong, has caused the Supreme Court of Ohio considerable trouble in the case of the City of Zanesville v. The Zanesville Telephone Company, 45 Bull. 31, and 59.

The proposition before the court was, whether Section 3461 of the Revised Statutes, which grants the probate court the power to determine upon what conditions and in what manner a telephone line may be constructed on a street or alley of a municipal corporation in case the city and the telephone company are unable to agree thereon, bestows upon said court a judicial or a legislative power. The Supreme Court on October 16, 1900, by an unanimous decision held that the statute was unconstitutional, as this power was not judicial in its character, since it did not determine "what the law *is* as applied to certain existing facts but what the law shall be, for the regulation of future cases falling under its provisions." In January, 1901, upon a rehearing of the same case and after listening to an argument by Senator Foraker, the court reversed itself, all the judges changing their opinions except Judge Minshall, who wrote the opinion in the first decision, and Judge Shauck. The essence of the last decision as gathered from the syllabus, is that the enforcement of the rights conferred upon telephone companies by Section 3461, by the probate court, is a judicial function, although the "judgment or order authorized be of such a nature that it can only be performed progressively during a future period." The court, therefore, seems to characterize the power as being judicial and not legislative, although we reach the latter conclusion only by inference, on the theory that the powers of each branch are mutually exclusive.

The real question in issue and the one upon which the court divided, is one of judicial interpretation as to the nature and character of the power conferred upon the probate court, and on this point the court changed from a positive opinion that admitted of no doubt or question, in its first decision,[1] to an exactly contrary conclusion.[2] As first viewed "It seems then too clear for argument, that the power invoked is none other than the power by ordinance, to regulate the use * * * of streets and alleys. A power primarily in the city, legislative in its character, but lost to it and conferred upon the probate court, by its failure to act in a reasonable time." In its second decision the Supreme Court evidently considers it extremely doubtful, whether this particular power belongs exclusively to the legislative or executive department, and in accordance with the rule, that every doubt must be resolved in favor of the statute, holds that its constitutionality must be

(1) 45 Bull. page 34.
(2) 45 Bull. 59.

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upheld.[1] As Judge Cooley says the task of overruling the decision of the legislative department "is one to be entered upon with caution, reluctance and hesitation and never until the duty becomes manifestly apparent."[2] Therefore the court fortifies itself by taking the more conservative position in addition to the one before mentioned, "that it will not declare the statute unconstitutional, unless it appears that the power conferred *belongs exclusively* to the legislative or executive department." Since it does not appear that this particular power is clearly and distinctively legislative or executive, the fact that the legislature has declared it to be judicial, "*is itself of controlling importance*" in determining its character.

This second decision of the Supreme Court is in itself a recognition of the doctrine, for which it is contending, viz., that each of the three branches of the government should be limited to its proper functions and that no one should assume or have thrust upon it, power which belongs to another department. It is just as clearly recognized as a principle of constitutional law, that the judicial department should not declare an enactment of the legislative department unconstitutional unless the "violation of the constitution is proved beyond a reasonable doubt,"[3] as it is that legislative powers should not be conferred upon judicial bodies. The legislative discretion must be allowed full sway and can be restricted only when the court feels a clear and strong conviction of the incompatibility of the statute with the constitution.[4] If the court, therefore, is in doubt as to the nature of the power conferred upon the probate court under Section 3461 and places its decision upon that ground, it is difficult to see how it can be criticized or assailed.

What has been the attitude of the Supreme Court in the past as to this kind of legislation? In the case of Walker v. The City of Cincinnati, 21 O. S. 14, the question arose upon a statute authorizing the judges of the Superior Court to appoint trustees for a contemplated railroad and the court says: "Does it follow, that no function except such as are purely judicial, can be constitutionally annexed to the office of a judge?" This statute granting the power to a court, to appoint officials of a railroad was held constitutional. Another statute, which relates to the annexation of contiguous municipal corporations to the city of Cincinnati, provides that the common pleas court shall appoint three commissioners to determine upon what terms and conditions the annexation shall be made and that their report shall be subject to the

(1) Lewis v. McElvain, 16 O. 355, Railway Co. v. Commissioners of Clark County, 1 O. S. 77 (opinion of Ranney J.) Lehman v. McBride, 15 O. S. 591, and State v. Kendle, 52 O. S. 356.

(2) Principles of Constitutional Law, page 152.

(3) Ogden v. Saunders, 12 Wheat. 213, 270.

(4) Fletcher v. Peck, 6 Cranch. 87, 128.

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approval of said court. The statute was attacked on the ground that these powers were not judicial and therefore it was unconstitutional. But the Supreme Court in State v. Cincinnati, 52 O. S. 419 (1895) was of the opinion that there was "no constitutional obstacle in the way of investing a court or judge with such powers" (page 451). "We are not convinced, either that the legislative judgment in that respect is at fault, or that the legislative purpose must fail; at least so long as the court and judges charged with the performance of the act interpose no objection" (at page 452). This case involved no executive or legislative function, other than the appointing of commissioners and approving of their report, while the principal case constitutes the probate court as the commissioner to determine the conditions with which the telephone company must comply, in order to entitle it to use the streets.

The precise question before the court in the Zanesville case would, therefore, appear to be a new one. The law of this state in regard to the right to construct telephone lines, is very different from the law in regard to the construction, for instance, of street railways. The principal difference lies in the manner in which the privilege or right to construct the same is conferred; in the former case the legislature has *directly* conferred, by the provisions of Sections 3454 and 3461-1, the right upon telephone companies, while in the latter case the legislature has delegated to the council or county commissioners the *power to confer* the right or franchise upon a street railway company, if it sees fit to do so. Therefore telephone companies have by these statutes acquired certain rights, which might be termed an indeterminate franchise, subject to be made definite and certain, by the action of the probate court in fixing the terms and conditions thereof. Whether this determination is properly a judicial function, or legislative similar to the act of *granting* the right, is the precise point in controversy. Is the exercise of this power more similar to the power of an arbitrator, who is called upon to define how certain vested and recognized rights shall be exercised, than to the power of the legislative body in making the *grant* of such rights? The question is certainly not free from doubt, but it would seem that the determination of the manner in which a franchise should be exercised, was of the same nature as the conferring of the right itself, for the reason that they are so mutually interdependent, that one is of no value without the other. Therefore if the act of bestowing the right is legislative, the act of prescribing how the right shall be used, should also be declared legislative.

If the doctrine of this case is adhered to, almost any legislative right can be transferred to a court of justice, by passing a law conferring upon certain persons the right to have the question determined by the court, for instance the right to grant a franchise to a street rail-

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way or the right to prescribe the terms and conditions upon which contracts for city improvements shall be made. In short it is difficult to imagine a case, except those which involve the exercise of the police power and the disposition and management of city property, in which a legislative power could not be transferred to the courts, provided the state legislature pass a statute similar to the one now in question. Although the Supreme Court states, that powers, which distinctively belong to any one department, can not be imposed upon another, yet the interpretation of the court as to what is or is not a distinctive function, practically renders the rule valueless.

Comments.

Damages—Measure Thereof in Deceit—Plaintiffs brought action against defendant for the recovery of damages for deceit alleged to have been practiced upon them by defendant in the sale of a gold mine in California. As to the amount of damages recoverable in such cases the court held that the measure of damages in an action for deceit in the sale of property is not the difference between the value of the property as it proved to be and as it would have been if as represented, but is the difference between the real value of the property at the date of sale and the price paid, with interest thereon, together with such outlays as were legitimately attributable to defendant's conduct, since the damages are limited to the direct pecuniary loss, if any, of the plaintiff, and will not cover the expected fruits of an unrealized speculation.

James M. Sigafus v. Dudley Porter et al., 21 Sup. Ct. 34.

In the opinion in this case the court cited the case of Rockefeller v. Merritt, 40 U. S. App. 666, 674, 76 Fed. Rep. 909, in which Judge Sanborn said: "The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property, is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. It is the loss which he has sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and is limited to compensation." In accord are Smith v. Bolles, 132 U. S. 125; Peek v. Derry, L. R. 37 Chan. Div. 541, and numerous decisions in the state courts. A more difficult question presents itself where the action may be construed to be one in contract on the warranty. However, a proper construction of the pleadings ought to solve this difficulty, as the rules as to the measure of damages are well recognized and easily applied, when it has been determined whether the action sounds in tort or contract. This question came up in a recent

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case in Ohio, Linerode v. Rasmussen, 44 Bull. 354, in which the Supreme Court delivered the following opinion: "Where the defendant was sued on notes given for purchase money for a farm, and sought to recoup damages on the ground that the plaintiff had misrepresented that 'underlying said premises was a three or a three and a half foot vein of good, bituminous, minable coal,' whereas there was no coal whatever under said premises, the measure of damages is the difference between the value of the farm as it was represented to be and its actual value at the time of the purchase." The case is so meagerly reported that it is difficult to determine whether the defence rested upon tort or contract. The facts are much the same as those in Sigafus v. Porter supra, yet the Ohio court has adopted the rule of damages applicable to cases of warranty; although the court assumes that the defence arises from the fraudulent misrepresentations of the plaintiff. It would seem, therefore, that this case is in direct conflict with the recent decision of the Supreme Court of the United States. However, the report of the case is so brief, that it is quite possible that it turned upon a contract of warranty and not upon deceit; otherwise the rule of damages hardly seems to have been correctly stated.

Sub-Surface Waters—Right of Land Owner—In the case of Forbell v. City of New York, decided by the Court of Appeals, 58 N. E. (N. Y.) 644, the defendant was sought to be restrained from operating a water system by means of wells and pumps on its own land, as a result of which the natural supply of sub-surface water became exhausted, rendering plaintiff's land unfit for the growing of celery and water cresses.

In the case of Acton v. Blundell, 12 M. & W. 324, decided in 1843, it was held that an action could not be maintained by one land owner against another who sunk a well on his own land, thereby draining away the water from the plaintiff's land, and for the reason that the water which feeds the well "does not flow openly in sight," hence no one can tell of its exact course. The earlier New York cases follow Acton v. Blundell. Village of Delhi v. Youmans, 45 N. Y. 362; Bloodgood v. Ayers, 108 N. Y. 400. In the present case the court concedes that the letter of the law as expounded by these earlier cases denies liability. But finding, as it does, features in this case which make the reasons for the former decisions inapplicable here, the court is constrained to decide against the defendant. These added features were the knowledge on part of the defendant, that the underground operation and habit of the store of water in the surrounding lands would enable it to capture a large part of it. Also the fact that the drainage was conducted on such a large scale. On this point the court says that

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to fit up the land "with wells and pumps of such persuasive and potential reach that from their base the defendant can tap the water stored in plaintiff's land and all the regions thereabout" is unreasonable as to the plaintiff and others whose lands are thus sapped.

This decision, though it forms an exception to rules laid down in the cases, seems justly decided. And, as the court says, the immunity from liability claimed by the defendant "does wrong under the letter of the law, in defiance of its spirit," adding that the defendant might employ the right of eminent domain and thus secure the land needed for its purposes.

Wills—Codicil—The testatrix, about two months after making her will, wrote on a sheet of paper, "I this day give to my daughter W. my residence on Broadway and all pertaining thereto; to have and hold forever in her own right," which she signed and acknowledged, as she would a deed, before a notary, in the presence of two witnesses who signed the same. This paper was found among her valuable papers after her death, in an envelope on which was endorsed in her handwriting and signed by her, "For W. at or after my death." Held that these writings constituted a codicil to her will.

Grigsby's Legatees v. Willis' Estate, 59 S. W. (Texas) 574.

The court held first, that the endorsement on the envelope "could be read in connection with the paper to which it refers," although not written on the same sheet of paper, nor actually attached or fastened together in any way; second, that, taken together, a testamentary intent is manifest. If the words on the envelope, "For W. at or on my death," had been actually incorporated in the codicil, the case would have presented no difficulty, as it is well established that, although an instrument is described on its face as a deed, it may operate as a will if there is testamentary intent. Symmes v. Arnold, 10 Ga. 506; Gage v. Gage, 12 N. H. 371; Wheeler v. Durant, 3 Rich. Eq. 452. Whether it was proper to treat the two writings as one is a question of some difficulty. The sheet of paper was properly signed and witnessed, and if the codicil is valid it must be founded on this document, as the endorsement on the envelope was merely signed and not witnessed. Unattested documents may be considered parts of the will if clearly and distinctly identified by the will. Newton v. Society, 130 Mass. 91; Vogel v. Lehritter, 139 N. Y. 223; Skinner v. Society, 92 Wis. 209. But to hold that the same rule applies where the means of identification is to be found only in the unattested document, is a rather novel doctrine. However, there are some decisions which go so far as to hold that enclosing the documents in the same envelope is a sufficient reference to each other. In re Skerrett's Estate, 67 Cal. 585. In view of

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the fact that in the principal case the envelope was found unsealed, and that the only connecting link between the two instruments to indicate that they were to be construed together arose from one being inside of the other, the rule would seem to easily admit of trickery by interested parties, and therefore a rather dangerous precedent.

Notes on Ohio Decisions.

Freedom to Contract—Limited only by the Police Power—The case of in re Gilbert D. Preston, 45 Bull. 34 came up on a writ of habeas corpus, for a violation of the act of March 9, 1898 (93 O. L. 33), which requires operators of coal mines to weigh the coal and credit the same to the miner, before it has been screened and the foreign substances removed. The purpose and effect of the law was to make the compensation of all miners dependent not upon their care and skill, but merely upon the amount of material turned out, whether it was coal, slack or some other substance. Therefore men of equal physical strength and industry would receive the same wages, irrespective of the question of efficiency and the value of the services to the employer. Consequently the standard wage would be that of the least efficient workman and the experienced and careful miner would be deprived of his merited compensation. This, the court says, "may be a favorite object of socialism, but it is inimical to the individual rights, which are preserved by the constitution." Such an interference with the right to make contracts, which practically determines the price to be paid for mining coal, can only be supported as an exercise of the police power, on the ground that it is necessary for the public welfare. As no such object could be found in this act, it was held unconstitutional as repugnant to the bill of rights, in that the right to contract was unnecessarily invaded. The regulation of prices is unwarranted, except in cases where some special privileges have been conferred by the State, Slaughter House Cases, 16 Wal. 36, or where the business is of a quasi public character and is under the control of a virtual monopoly. Munn v. Illinois, 94 U. S. 113. Cooley on The Principles of Con. Law, page 246. This exception would probably not apply as between the operator and the workman in the business of mining coal, and certainly not where the regulation had for its object the determining of an arbitrary standard of wages and putting a premium on inexperience and carelessness. Legislative enactments similar to the one involved in the principal case have been declared unconstitutional on the same ground. In re House Bill, etc., 21 Col. 27; Millett v. People, 117 Ill. 294; Ramsay v. People, 142 Ill. 380. However, contrary conclusions have been reached in State v. Coal Co., 36 W. Va. 802, and State v. Wilson, 61 Kan. 32.

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Constitutional Law—Tramp Law—An Ohio law, commonly known as the "Tramp Law," provides, among other things, that whoever not being in the county in which he usually resides is found going about begging shall be deemed to be a tramp, and any tramp who threatens to do an injury to the person or property of another shall be imprisoned, etc. Defendant in error, being indicted under this law, set up its unconstitutionality. It was held in State v. Hogan, 58 N. E. (Ohio) 572, that it is not in conflict with Art. 2, Sec 26 of the Ohio constitution, which provides that all laws of a general nature shall have uniform operation throughout the state, since it is to be regarded as applying to such tramps as a class, and hence not open to the objection that it seeks to punish an offence committed in one county in a different way from a like offence committed in another county. Likewise it is not in conflict, in that respect, with the fourteenth amendment to the federal constitution, protecting against the deprivation of life, liberty or property without due process of law.

Recent Cases.

BILLS AND NOTES—CHECK—ASSIGNMENT OF A FUND IN INSOLVENT BANK.—Where a depositor receives from the cashier a check against his deposit, the cashier at the same time marking such sum as paid in the depositor's pass book, this does not amount to an assignment of the amount by the bank, but merely changes the evidence of the debt, arising from the deposit. It in no way changes the nature of the debt, so as to entitle him to preference over other creditors of the bank at the hands of the receiver if the check is not paid before the failure of the bank.

Clark v. Chicago Title & Trust Co., 57 N. E. (Ills.) 1061.

CARRIERS—SALE OF TICKET.—Plaintiff alleged that the defendant railroad company sold the plaintiff a 1000-mile ticket and through its negligence failed to place his right name thereon; that its conductor refused to receive such ticket; and that the plaintiff exercised due care. No special damages were alleged. Held, that it was error to sustain a demurrer, because the facts alleged entitle the plaintiff to nominal damages.

Holden v. Rutland R. Co., 47 Atl. (Vt.) 403.

CARRIERS—TERMINATION OF RELATION OF CARRIER AND PASSENGER.—Plaintiff was a passenger on one of the passenger trains of defendant, and after alighting from said train in the early morning and while it was yet dark, at a regular station of defendant company, she was injured by falling from the platform of the station to the ground below. The platform extended around the station three feet above the ground, and had no railing. The company had no lights about the station. The court held that the relation of carrier and passenger between a railroad company and a passenger on one of its trains is not terminated when the passenger alights at a station, until he has had a reasonable time, under all the circumstances, to leave the station; and a woman alighting at a station in the early morning, while it was dark, and who was injured immediately afterwards by falling from the platform owing to the lack of a railing, is not debarred from recovering for the injury, because she had formed the intention of remaining at the station until daylight.

Chicago, Rock Island & Pacific Ry. Co. v. Wood, (C. C. A.), 104 Fed. 663.

DAMAGES—DEATH BY WRONGFUL ACT.—Action by the administrator against the defendant company for causing the death of a boy 16 years of age.

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The deceased had no next of kin except a father who had not been heard from for five years. The deceased never contributed to the father's support and always kept his own earnings. Verdict was given for $900.00 for plaintiff. Held: That as the father, if he returned, could not have over 4½ years of pecuniary aid from the boy, and this amount would be reduced by the boy's own living expenses, the verdict is excessive and will be set aside unless the plaintiff consent to have it reduced to $500.

Grieve v. Ry. Co., 47 Atlantic (New Jersey) 427.

EASEMENTS— ESTOPPEL.—Defendant's grantor laid out an addition to an unincorporated village. Defendant sold two lots to the plaintiff, describing them according to lots and streets of the addition. The town board declared the street in question a highway but never formally opened or improved it. The defendant, after the plaintiff's purchase, fenced up the street. Held: That the plaintiff was entitled to have the fences removed and their maintenance restrained, for, by his purchase with reference to the street, he obtained an easement to use the same in connection with his lots. The grantor was estopped to deprive him of this, whether the public had such easement or not.

McFarland v. Lindekugel, 83 N. W. (Wisc.) 757.

If the contest is between an individual and a municipality, a formal opening is required; this, however, is not necessary as between grantor and grantee. Case might be put on the ground of an implied covenant.

EVIDENCE— DYING DECLARATION— ABORTION.—On an indictment charging a person with committing an abortion causing the woman's death. Held: That her dying declarations are legal evidence.

State v. Meyer, 47 Atl. (N. J.) 486.

The general rule permits the admission of dying declarations only in those cases in which "the death of the deceased is the subject of the charge." Rex v. Mead. 213 O. C. 605. People v. Davis, 56 N. Y. 95. 1 Greenleaf on Evidence, §156. Although death results from the abortion, yet if the indictment does not charge some form of homicide, the declarations are inadmissible. Regina v. Hind, 8 Cox, C. C. 300. State v. Harper, 35 O. S. 78. The common law rule has been changed by statute in New York (1875) and in Massachusetts (1889), allowing such declarations in abortion cases. In accord with the principal case, is that of Montgomery v. State, 80 Ind. 338.

FIXTURES— WAGON SCALES.—Affixing a wagon scale by placing the same on a stone and mortar foundation and running iron rods under the building, is such an attachment as will render it a fixture.

Thomson v. Smith, 83 N. W. (Iowa) 789.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.—Plaintiff sued his wife's parents to recover damages for the alienation of her affections. The trial court instructed the jury, in substance, that "if the separation of the plaintiff's wife from him was the result of active interference of the defendants, either by threats, persuasion, or arguments, then the defendants were liable." Held: That the instruction was erroneous, because it placed upon the defendants a much more grievous burden of justification than parents ought to be compelled to bear. Oakman v. Belden et al., 47 Atl. (Me.) 553.

The law relative to the extent to which a parent may, with impunity, interfere with the marital relations of a married child, is well stated by the Supreme Court of Maine, speaking through Savage, J., as follows: "A parent may not, with hostile, wicked, or malicious intent, break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments. Whether the motive was proper or not is always to be considered. Whether the persuasion or argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises

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or upon false information, or his advice or his interference may have been unfortunate; still if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband." Hutcheson v. Peck, 5 Johns 196, Bennet v. Smith, 21 Barb. 439. Holtz v. Dick, 42 O. S. 23.

MASTER AND SERVANT—FALSE IMPRISONMENT.—The defendant, the proprietor of a department store, sold the plaintiff's wife a gas stove and oven, which were paid for. The oven being unsatisfactory was returned and defendant agreed to furnish another in its place. The defendant sent the oven to plaintiff's apartments, but instead of instructing the driver to deliver it upon payment of the few cents due, marked it "C. O. D." The driver delivered the oven and when the plaintiff refused to pay the full amount, demanded the return of the oven, which was refused. The driver upon this refusal had the plaintiff arrested, charging him with theft of oven. At the hearing he was discharged. The marking of the oven "C. O. D." was a mistake of one of the employees of the defendant. Held: The driver had full authority to protect the property of his employer and if he, in discharge of his duty, deemed it necessary for its protection to arrest the plaintiff, the act would come within the scope of his employment and would render his master liable.

Craven v. Bloomingdale, 66 N. Y. S. 525.

MASTER AND SERVANT—FELLOW-SERVANT WORK—Plaintiff was injured by the falling of a stone in defendant's tunnel. It was the duty of the plaintiff and others, who were in charge of the tunnel boss, to cart away the stone thrown about by blasting. The tunnel boss, while doing work of the same character, caused the stone to fall by removing some loose rock around it. Held: Defendant not liable, the tunnel boss acting at the time as fellow-servant, notwithstanding he was plaintiff's superior.

Ross v. Union Cement & Lime Co., 58 N. E. (Ind.) 500.

A contrary rule exists in Ohio, where it is held that where one servant is placed in control of another and is injured through the negligence of that other while he is discharging the duties of the one under his control, the master is liable. Berea Stone Co. v. Kraft, 31 O. S. 287.

MILITARY TRIBUNAL—RIGHT TO REVIEW.—An application was made to the Supreme Court of the United States to review the proceedings of a military tribunal, established by General Davis in the island of Porto Rico. The court held that it had no such jurisdiction, as a military tribunal does not come within the meaning of the term "courts with jurisdiction in law and equity," as used in Article 3 of the Constitution.

In the matter of José Vidal, et al., 21 Sup. Ct. 48.

NEGLIGENCE— BLIND PERSONS. —The plaintiff, a blind man, was injured by a defect in the sidewalk and recovered from the town a judgment of $1,000. Upon error it was held, that he was not guilty, as a matter of law, of contributory negligence in going upon the public streets, but "was called upon to exercise such reasonable care and caution as an ordinary prudent person with a like infirmity would have exercised."

Carter v. Village, 66 N. Y. Supp. 1059.

The town was held to be under no greater obligations to keep its sidewalks in safe conditions for blind persons than for any others, but the blind person himself must exercise greater care than persons who enjoy the full use of their eyes.

NEGLIGENCE—NAVIGATION ON RIVERS. —Where plaintiff alleged that his canalboat, lying at a dock on the Hudson river, was crushed against the side of the dock and sunk by the swells caused by the negligent handling of the defendant's steamboat, and the facts were submitted to a jury, it was held error to charge that in navigating rivers where small boats are accustomed to ply, steamboats must proceed at a rate of speed sufficiently slow to avoid danger from swells.

Bell v. New Jersey Steamboat Co., 66 N. Y. Supp. 1031.

This case is interesting as an application of law that there are circumstances in all lines of business that must be accepted, expected and provided against; in

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short, that there are certain risks which are assumed. Here the rule is applied that while careful and prudent management of steamboats is required with a view to the safety of smaller craft, this must not be made a pretense for excluding or preventing the practical use of large or different vessels. Citing The Daniel Drew, 13 Blatchf. 523.

REMOVAL OF CAUSES—JOINT ACTION AGAINST EMPLOYER AND EMPLOYEE—An action was brought against the railroad company and two of its employees for wrongful death. The railroad company desired to remove the cause into the United States Circuit Court. This was denied by the State Court and upon a writ of error to the Supreme Court of the United States, the latter court held that an action against a railroad company and two of its employees, charging them with concurrent negligence in killing a person at a railroad crossing, is joint, and not several, and therefore cannot be removed into a Federal court by the railroad company on the ground of diverse citizenship, when the employees are citizens of the same state as the plaintiffs.

Chesapeake & Ohio Ry. Co. v. Dixon, 21 Sup. Ct. 67.

In following its prior decisions on this question, the court holds that, although the plaintiff might have brought a separate action against each of the defendants, yet if the negligence of the defendants was concurrent, he is entitled to prosecute them jointly if he so chooses. Powers v. Ry. Co., 169 U. S. 92. Since therefore the defendants are properly joined, the controversy is not one "which is wholly between citzens of different states" and cannot be removed, although the purpose of joining the defendants was to defeat a removal. Ry. Co. v. Waugelin, 132 U. S. 599. The importance of this decision, in restricting and limiting the removal of cases to the Federal courts, which has become so prevalent in this age of "trusts," is quite apparent, and will doubtless be taken advantage of in those states in which the Federal law is less favorable to the plaintiff.

SPECIFIC PERFORMANCE—AGREEMENT TO CONVEY LAND.—Action for specific performance of a parol agreement by a father to convey a farm to his son if the son would enter upon and make improvements on the land and furnish him a home as long as he should desire it. Possession was taken and improvements were made in reliance on the promise, the father residing on the land with the son. Held: That specific performance will lie.

Clancy v. Flusky, 58 N. E. (Ill.) 594.

The agreement being a parol one with not be enforced unless such acts of performance can be shown on part of the vendee as will take the case out of the operation of the statute of frauds. As to what acts of possession are sufficient in this respect, it is generally held that they must be unequivocally referable in their nature to a contract such as is alleged. Madison v. Alderson, S. R., 8 App. Cas. 467. And the possession must also be exclusive. Gallagher v. Gallagher, 31 W. Va. 9. Fry v. Shepler, 7 Pa. St. 91. In this case the possession hardly seems so exclusive, or unequivocally referable to the contract in question. As the father continued to live on the premises, it would not seem that the son's possession was exclusive; however, their manner of living would probably furnish conclusive evidence on that point.

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John Marshall

IN HIS RELATION TO THE ESTABLISHMENT OF THE SUPREMACY OF THE SUPREME COURT OF THE UNITED STATES AS AN ORGAN OF CONSTITUTIONAL INTERPRETATION.

HAMPTON L. CARSON
of the Philadelphia Bar.

This is the one hundredth anniversary of the day on which John Marshall took his seat as Chief Justice of theUnited States, and we have met to commemorate his virtues and his services. The ceremonies of the hour are not simply unusual; they are unprecedented. Not here alone but in the National capital, in every Federal District, in every State at centres of population, the members of our profession have paused in the midst of labor to contemplate the character of a judge whose intellectual and moral attributes lifted the magistracy of the nation to a position which has fixed the gaze of posterity and awakened the admiration of mankind. It would be idle for me to attempt to add to the many well-considered eulogies upon his character, or to present, even in outline, the details of his biography. It would require a volume to do justice to his career, and within the limits of a short address it is manifestly impossible to do more than glance at a single aspect of his many-sided greatness. I intend to invite your attention to *Marshall in his relation to the establishment of the Supremacy of the Supreme Court of the United States as an Organ of Constitutional Interpretation.* I ask you to view him as the Founder of our Constitutional Jurisprudence.

To us the statement of this theme seems but the utterance of a truism. We have been so long accustomed to regard him as the unrivalled head of our National Judiciary that his title to the place passes without challenge; but I propose to review the steps by which that title was established. He came upon the bench at a critical period in our history, at a time when there was a violent onslaught upon the

An address delivered under the auspices of the Cleveland, Ohio, Bar Association, at the Chamber of Commerce, February 4, 1901.

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Federal Judiciary, when the independence of his tribunal and the scope of its powers were matters of doubt; when jealous fears of Federal encroachment were rampant; he left it, thirty-five years later, in the serene conviction that the hour of peril had passed, for he had announced and illustrated certain canons of construction which have been adopted as the cardinal doctrines of the court.

The task of Marshall, to state it concisely, was "to establish justice," or, to put it in another form, to secure recognition of the final right of the judiciary to interpret and enforce the Constitution. This involved the assertion of judicial power to confine Congress and State legislatures within constitutional bounds, and especially the exercise of such power in so wise and salutary a manner as to strengthen the national government, vindicate the independence of the judiciary, and by calm and incontestible logic subdue all malcontents. It required absolute fairness and infinite patience in the comparison of legislative acts with the Constitution. It called for fearless honesty in the promulgation of a judgment without regard to consequences. It needed the active exertions of a mind of the highest order to protect that paramount law which all had sworn to support.

The dispensations of Providence in behalf of our favored country, while numerous and striking, are nowhere more signally illustrated than in the series of events which secured for Marshall the highest official place and prevented his appearance in a subordinate station—a matter of the greatest moment, for a master mind requires for the full employment of its supreme energies the responsible position of chief and the most exalted rank to sustain it. It is pertinent to observe that any one of the following events had they been ordered otherwise, would have excluded John Marshall from the bench entirely, or have deprived him of the Chief Justiceship, occurring, as they all did, within the narrow compass of six years, and his opportunities being limited to the lifetime of the Federalist party.

In 1795 John Jay resigned the Chief Justiceship upon his election as Governor of New York. Had he preferred the ermine, Marshall would never have reached the highest place, as Jay lived until 1824. On Jay's resignation, William Cushing, of Massachusetts, the senior Associate Justice, was actually commissioned by Washington as his successor. Had he accepted his promotion, Marshall would again have failed of the first distinction, for Cushing remained in active service until 1810. Oliver Ellsworth became Chief Justice in March, 1796, and resigned in December, 1800, while acting as Envoy Extraordinary and Minister Plenipotentiary at Paris. Had he failed to resign, Marshall would, for a third time, have lost his opportunity, for Ellsworth lived until 1807. In 1799 James Iredell, an Associate Justice, died, and his vacant seat was offered to Marshall, who declined it. Had he accepte

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it, he would have been for life in the position of a subordinate. On Ellsworth's resignation, President Adams, at Marshall's own suggestion, offered the Chief Justiceship a second time to John Jay, who declined it. Had he accepted, Marshall would never have reached the bench in any position. On Jay's declination, Marshall urged the appointment of Justice Paterson, the second senior Associate. Had the President been persuaded, Marshall would, for a sixth time, have forfeited a chance. The suggestion was then made to President Adams by some interested friend that possibly he himself might take it. Had he yielded, the seventh and last opportunity of Marshall would have been extinguished, for with the inauguration of Jefferson, his hopes of judicial preferment would have vanished forever. But Mr. Adams disclaimed personal ambition. "I have already," he wrote, "by the nomination to this office of a gentleman in full vigor of middle life, in the full habits of business, and whose reading of the science of the law is fresh in his mind, put it wholly out of my power, and, indeed it never was in my hopes and wishes." On the 31st of January, 1801, he requested the Secretary of War "to execute the office of Secretary of State so far as to affix the seal of the United States to the enclosed commission to the present Secretary of State, John Marshall of Virginia, to be Chief Justice of the United States."

"He was born," exclaimed William Pinkney, "to be the Chief Justice of any country into which Providence should have cast him," and although the celebrated Maryland advocate was speaking of his intellectual and moral qualifications, yet it is plain from the preceding narrative of extraordinary events that Providence had decreed that he should be Chief Justice. In after years, John Quincy Adams said that if his father had done nothing else to deserve the approbation of his country and posterity, he might proudly claim it for this single act.

It is hard for us at this distant day to appreciate the magnitude or the difficulty of the task which confronted the Chief Justice. There were six distinct influences to be overcome—all of them hostile, most of them virulent and violent. Let us briefly review them in turn, in order to properly estimate the value of the services rendered by Marshall in his great deliverances in Marbury v. Madison[1] and Cohens v. The State of Virginia.[2]

A bitter assault had been made upon Article III of the Constitution of the United States relating to the Judiciary Department, and the most violent passions had been fully aroused. Many of the most famous names in our history were vehement in their opposition, while many others were either neutral or gave to the Constitution but a lukewarm support. Elbridge Gerry, of Massachusetts, had expressed a fear

(1) 1 Cranch, 137.
(2) 6 Wheaton, 264.

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that the Judicial Department would prove oppressive, and, in a pamphlet published over the signature of "A Columbian Patriot," declared: "There are no well defined limits of the judicial powers; they seem to be left as a boundless ocean that has broken over the chart of the supreme law-giver, 'thus far thou shalt go and no farther,' and as they cannot be comprehended by the clearest capacity or the most sagacious mind it would be a herculean labor to attempt to describe the dangers with which they are replete." Edmund Randolph, the Governor of Virginia, who had refused to sign the Constitution, strenuously objected that there was no limitation or definition of the judicial power. George Mason, the remaining member of the Federal Convention, who had refused to sign, declared that "the Judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States." Richard Henry Lee was full of dire prophecies of disaster. Patrick Henry foresaw "the prostration of all our rights." Luther Martin pointed out how a vast and varied jurisdiction had been snatched from the State Courts. In every State similar fears were expressed, and the most gloomy predictions were made. Everywhere the subversion of the State governments and the loss of personal freedom were made the burden of complaint in "Observations," "Examinations," "Addresses," "Letters," "Remarks" and "Objections." It is true that Edmund Pendleton, James Madison, Alexander Hamilton, John Jay, James Wilson, Noah Webster, Tench Coxe, Alexander Contee Hanson, James Iredell, and Marshall himself, in the Virginia Convention, had replied to impassioned invective by calm and persuasive argument, but the air was still thick with the smoke of conflict and the bosom of the political sea was still heaving with emotion. But eleven years had passed since the ratification of the Constitution, and the waves of opposition still broke in angry surges at the base of the Judiciary Department.

Besides this, there were a lack of hearty support of the Judiciary Department by men of distinction, lack of courage on the part of members of the judicial staff in asserting or maintaining a position of strength and dignity, and in many instances an openly expressed preference for service under the States, or in other fields, all of which combined to weaken the influence of the judiciary. Such men as Edmund Pendleton, of Virginia, Robert Hanson Harrison, of Maryland, and Charles Cotesworth Pinckney and Edward Rutledge, of South Carolina, had declined the commissions tendered them by Washington in the Supreme Court of the United States. John Rutledge, of South Carolina, Thomas Johnson, of Maryland, John Blair, of Virginia, and Alfred Moore, of North Carolina, had resigned. John Jay and Oliver Ellsworth had abandoned the office of Chief Justice

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after but a few years of tenure. The senior Associate was unwilling to accept the responsibility attached to the head of the Court, and John Jay, when asked a second time to assume the ermine, wrote under date of January 2d, 1801, to President Adams as follows: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the National Government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system."

That such an estimate of the Supreme Court and such a despairing prophecy should be uttered by such a man as John Jay would occasion much surprise were it not a fact that one of the vices of the age was the frequent desertion by the Judiciary of its own exalted functions for other branches of the service. Doubt and uncertainty as to its true position clouded its earlier years, "when the politicians—or statesmen—of that day bivouacked in the Chief Justiceship on their march from one political position to another."

The third influence, adverse in its results to the dignity and power of the Supreme Court, derived its force and effect from the heavy blow dealt judicial authority in the adoption of the Eleventh Amendment—following the decision in Chisholm v. State of Georgia.[1] It had been held that a State could be made party defendant, in any case, in the Supreme Court, at the suit of a private citizen of another State; that an action of assumpsit could be maintained against a State; that service by summons upon the Governor and Attorney General of a State was a competent service, and further, that unless the State appeared, or showed cause to the contrary, a judgment by default would be entered. These views were dissented from by but a single judge, and the decision, as soon as pronounced, created much excitement and fanned anti-federal sentiment into a flame. Every State was burdened with heavy debts. Several had been sued, and the Legislature of Georgia responded by a statute denouncing the penalty of death against anyone who should presume to enforce any process upon the judgment within her jurisdiction. The decision was pronounced upon the 18th of February, 1793; two days afterwards the Eleventh Amendment to the Constitution was proposed to Congress, and formally acted upon by that body in the following December. Its adoption by the States was announced in January, 1798. The case had sounded its first clear trumpet note by the Court in behalf of National power. It had proved a sum-

(1) 2 Dallas, 419.

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mons to battle, in which the Court had lost, and Marshall was obliged to face the task of recovering prestige.

The fourth antagonistic force was both formidable and persistent. The moment that Jefferson came into power a systematic and well organized attack was made upon the Federal Judiciary, which was regarded as a rampart behind which the hated Federalists had entrenched themselves. The act establishing separate Circuit Courts was repealed after a long and acrimonious debate in Congress, judges appointed and confirmed for life were driven from their seats notwithstanding the Constitutional argument that was made in opposition, and in order to prevent the new Chief Justice from interfering with these arrangements the shrewd legislative artifice was resorted to, under the dictation of the President, of suspending the sessions of the Supreme Court for a period of fourteen months by abolishing the August term. This Congressional assault was followed by the impeachment and conviction of Pickering, the United States District Judge in New Hampshire, and the impeachment of Associate Justice Chase, upon whose acquittal, John Randolph, in a rage, submitted as an Amendment to the Constitution that "The Judges of the Supreme Court, and all other courts of the United States, shall be removed by the President on the joint address of both Houses of Congress." But he could not command sufficient support. The bitterness of Jefferson had not died out when fifteen years later, he wrote to Ritchie: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."

A fifth influence to be overcome was derived from the prevalence of certain philosophic views of the relation of the co-ordinate departments of the government, which militated against the judicial control of the Legislature. It was argued that the Legislature had at least an equal right with the judiciary to put a construction on the Constitution, that neither of them was infallible, and that neither ought to be required to surrender its judgment to the other. If there was a difference of opinion as to the constitutionality of a particular law, the organ whose business it was first to decide on the subject, had a right to have its judgment treated with respect, and it was vain to say that the Legislature would be the aggressor. These views hung like dark clouds about the pathway of the judiciary, and strange to say, wore their most formidable aspect as late as 1825 in an opinion by Justice Gibson of the Supreme Court of Pennsylvania, when they finally disappeared in the sunburst of Marshall's overwhelming demonstration.

The last, and, from a legal point of view, the most formidable objection, lay in the comparative novelty of the idea of judicial control of the law-making power.

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The germ of the doctrine appeared in the case of Holmes v. Walton[1] argued in 1779 before Chief Justice David Brearly. In speaking of this decision, Gouverneur Morris wrote in 1785: "In New Jersey the judges pronounced a law unconstitutional and void. Surely no good citizen can wish to see the point decided in the tribunals in Pennsylvania. Such power in judges is dangerous, but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away." Prior to this remark, the case of Commonwealth v. Caton et al.[2] had come before the Court of Appeals in Virginia in 1782, while Rutgers v. Waddington[3] had been decided in New York in 1784, and Trevett v. Weeden[4] in Rhode Island in 1786. In the Virginia case, George Wythe, subsequently a member of the Federal Convention, declared: "If the whole Legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united efforts at my seat in this tribunal, and, pointing to the Constitution, will say to them 'Here is the limit of your authority, and hither shall you go, but no further.'" These views were again declared in several later cases. Without going into details: It is clear beyond controversy, that, when the Federal Convention met in 1787 for the purpose of framing a Constitution for the United States, the idea of controlling the Legislature through the judiciary was familiar to its leading members. It had been asserted in New Jersey, Virginia, New York, Rhode Island and North Carolina. The members of the convention who had, either as counsel or judges, considered such a question, were among the most prominent on the floor. There were: From Virginia, George Wythe, John Blair, Edmund Randolph and George Mason; from New Jersey, David Brearly; from New York, Alexander Hamilton; from North Carolina, Richard Dobbs Spaight, informed specifically by his correspondence with Iredell, of counsel in the case of Bayard v. Singleton.[5]

As to the views of the members of the Federal Convention, my time does not permit me to go into the language of the debates, but no careful student of Madison's Notes, or of the Journal of the Convention, can fail to reach the conclusion that it was generally admitted by the delegates that the Court would have the power under the Constitution, without any express gift. Such a power was commented upon with approval in the Convention by Gerry, Morris, James Wilson, Mason and Luther Martin. It was opposed by Mercer of Maryland and Dickinson of Delaware.

In the State Conventions, the matter was discussed in Connecticut

(1) Referred to in State v. Parkhurst, 4 Halstead (N. J.) 444.
(2) 4 Call (Va.) 1.
(3) Hamilton's Works, Vol. 7, 197; Edit. of J. C. Hamilton.
(4) Pamphlet of J. B. Varnum, Providence, 1787.
(5) 1 Martin (N. C.) 42.

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by Ellsworth, who called the judiciary "a constitutional check;" in North Carolina by Davies, in Pennsylvania by Wilson, and in Virginia by John Marshall, Edmund Randolph and Patrick Henry, the latter, while a decided opponent of the Constitution, being an earnest advocate of the independence of the judiciary.

In the *Federalist*[1] the independence of the judiciary was elaborately discussed, but the existence of the power to pass on questions of constitutionality was assumed.

The Judiciary Act of 24th of September, 1789, which regulated the appellate jurisdiction of the Supreme Court—a statute which it is no exaggeration to term a veritable bond of union—contains a clear legislative expression of the views of the First Congress under the Constitution—that the questions referred to are judicial questions, and that the determination of them belongs to the Supreme Court.

All this is very plain to us at the present day, but at that time nothing was settled. There was an inveterate conviction on the part of men, many of whom had been trained in the Temple, that the legislative branch of the government was originally omnipotent, and had been reduced by the Constitution to a position of co-ordination, which involved no inferiority. It was with slow, timid and halting footsteps that a determination was approached.

The first case before the Supreme Court which touched the question, illustrates the reluctance of the judges to assert their power. The case is Hayburn's.[2] Congress had directed the judges to act as Commissioners in the settlement of pension claims, subject to review by the Secretary of War and by Congress. Indecision characterized the action of the bench. In Yale Todd's case[3] there was no opinion, but a determination which involved the abstract exercise of the power. In Calder v. Bull,[4] Mr. Justice Chase expressed doubt as to the jurisdiction of the Court to determine that any law of a State Legislature contrary to the Constitution of the State was void, and declined to express an opinion whether the Supreme Court could declare void an act of Congress contrary to the Federal Constitution. In Cooper v. Telfair[5] the same Judge said: "It is a general opinion, indeed it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an act of Congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. I agree, however, in the general sentiment."

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(1) Nos. 78 and 80.
(2) 2 Dallas, 409.
(3) Note to U. S. V. Ferreira, 13 Howard 40-52.
(4) 3 Dallas, 386.
(5) 4 Dallas, 194.

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By the foregoing analysis the political and legal phenomena attending the advent of John Marshall are at least suggested. Enough has been said to show that a crisis had arrived. Our salvation as a nation called for a judicial utterance from a mind of equal powers of ratiocination with those of Newton and La Place, in an argument marked by the precision and certainty of a mathematical demonstration. The judiciary department had been thrust by downward pressure below its proper level, it was still sinking, and, if depressed much further, would be drawn by suction into rapacious sands. Marshall by sheer force of intellect underpinned and then uplifted it to a plane of independence beyond the reach of the Executive and Legislative branches, there to remain as a controlling power under the Constitution. There was no grinding of the screw, vast though the exertion, but his mind acted like a telluric force upheaving a continent slowly but surely above the level of the devouring sea. His opportunity came in Marbury v. Madison.[1]

In the December term, 1801, Charles Lee, late Attorney General of the United States, moved for a rule to show cause why a mandamus should not issue addressed to Madison, then Secretary of State, commanding him to deliver a commission to Marbury, whom President Adams, before the expiration of his term, had nominated as Justice of the Peace for the District of Columbia. A commission had been filled up, signed by the President, and sealed with the seal of the United States, but had not been delivered when Mr. Jefferson came into office. Acting on the idea that the appointment was incomplete and void so long as the commission remained undelivered, Jefferson countermanded its issue. The application made to the Supreme Court was for the exercise of its original jurisdiction under the terms of the Judiciary Act, and the main question undoubtedly was whether such a writ could issue from the Supreme Court under the gift of a jurisdiction by Congress in direct violation of the terms of the Constitution in distributing original and appellate authority. The Chief Justice in the course of his opinion said:

"If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it should be appellate, the distribution of jurisdiction made in the Constitution is form without substance. * * * The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited

(1) 1 Cranch, 137.

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and unlimited powers is abolished, if those acts do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative is true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. * * * If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

From this remorseless logic there could be no escape. It would have been easier to challenge a proposition of Euclid. Political opponents stormed at it in impotent rage, and occasionally a few atrabilious critics denounced it as mere *obiter dictum;* but it stood as an adamantine piece of reasoning, an invincible buttress of nationality, like the pyramid of Cheops, unshaken by the barkings of jackals at its base. It settled the principle that it is not only the right but the duty of the judiciary to pass upon the constitutionaliy of Congressional enactments, and declare them void if in conflict with the fundamental law. It established the supremacy of the court in matters of Constitutional construction.

The next step was to vindicate the appellate jurisdicion of the Court under the 25th section of the Judiciary Act.

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In 1816 a most important matter called for determination, presenting an instance of collision between the judicial powers of the Union and one of the greatest States on a point the most delicate and difficult to be adjusted. The Constitution of the Unied States had not in terms granted to the Supreme Court appellate power over courts of the States, and although silently acquiesced in at an early day, this jurisdiction was finally not only seriously questioned but absolutely denied by the State of Virginia. It required a repetition of instances, in which the Supreme Court vindicated its authority within certain well-defined limits, to convince the country that this power existed.

The 25th section of the Judiciary Act of 1789 had provided that—

"A final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission—may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

This act was a triumph of Federalist-centralization, and was a cession of power to the Supreme Court of more consequence to the States than the "necessary and proper" clause itself. Its critics believed that it had been dictated by a wish to make the State judiciaries inferior to the courts of the central government, because the powers of the General Government might be "drawn in question" in many ways and on many occasions. Mr. Henry Adams asserts that Chief Justice Marshall achieved one of his greatest victories by causing Justice Story, a Republican raised to the Bench in 1811 for the purpose of contesting his authority, to pronounce the opinion of the Court in the case of Martin v: Hunter's Lessee,[1] by which the position of the Virginia Court of Appeals was overruled.

The opinion of Mr. Justice Story, which is the first Constitutional judgment ever delivered by him, differs from most of his opinions in the fact that it is a closely-reasoned argument without the citation of

(1) 1 Wheaton, 304.

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authority. It displays many of the peculiar merits of the best judgments of Marshall, compactness of fibre and closeness of logic. It develops the relations of the States to the Federal government, and establishes that although their sovereign authority is only impaired so far as it is ceded, yet that the Constitution does not operate to create a mere confederation and aggregation of separate sovereignties, but contains in itself paramount and supreme powers surrendered by the States and the people for the common and equal benefit of all over whom this government extends,—and that among the powers thus ceded is the appellate jurisdiction of the Supreme Court over all cases enumerated in the clause vesting the judicial power.

The entire subject, though fully discussed, was not finally settled until the case of Cohens v. Virginia,[1] when the decisive utterance was made by Marshall himself.

The case had originated in a State court; it had been sought to carry it to the highest State court; the State of Virginia was a party, and a writ of error had been issued to bring the matter before the Supreme Court of the United States for review. The appellate jurisdiction of the court was denied. It was argued that the Constitution never contemplated giving jurisdiction to the Federal Courts, in cases between a State and its own citizens. Moreover, it was further contended that there was nothing in the Constitution that indicated a design to make the State judiciaries subordinate to the Judiciary of the United States; that the judiciary of every government must judge of its own jurisdiction; that the States were not to be denied the power of judging of their own laws; that as their legislatures were subject to no negative, so their judgments were subject to no appeal.

The Chief Justice recognized the magnitude of the questions, and said that they vitally affected the Union. "They exclude an inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining, peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution,

(1) 6 Wheaton, 264.

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laws and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. * * *

"If such be the Constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of the Court to say so; and to perform that task which the American people have assigned to the judicial department. * * *

"When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution; the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case arising under the Constitution or laws of the United States is cognisable in the Courts of the Union, whoever may be the parties to that case. * * *

"If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such, as essentially to affect the Constitution and the laws, such as to arrest the progress of the government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the Constitution and laws? * * *

"It is most true, that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

What intellectual strength, what far seeing statesmanship, what

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superb moral courage are here displayed! Every mind assented to his logic, every heart was thrilled by his intrepidity, and every eye was transfixed by the white light of judicial rectitude which shone in every sentence. The effect was decisive. The result has been acquiesced in by the country since that time without a murmur. The jurisdiction of the Court had at last been secured, vindicated, and sustained. Upon these cases, as upon pillars of enduring strength, will forever rest the supremacy of the Supreme Court.

But having established his jurisdiction, it remained for the Chief Justice to define judicially the powers, and develop the resources and hidden treasures of the Constitution, demonstrate its capacities, and adapt them to new relations of social life. He considered many of the most important powers of Congress; he established and sustained the supremacy of the United States; their right as a creditor to priority of payment; their right to institute and protect an incorporated bank; to lay a general and indefinite embargo; to levy taxes; to preempt Indian lands; to control the State militia; to promote internal improvements; to regulate commerce with foreign nations, and among the States; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy. He dealt with a mass of implied powers incidental to the express powers of Congress; gave life to the clause which authorized the employment of necessary and proper instruments; enforced the Constitutional restrictions upon the powers of the States; struck down pretentious efforts to emit bills of credit, to pass *ex post facto* laws, to control or impede the exercise of Federal powers, to impair the obligations of contracts, to tax national agencies, to exercise power over ceded territory, to cripple commerce, and to defy the lawful decrees of the Federal Courts. He upheld the paramount obligations of treaties, defined the law of treason, developed the admiralty and maritime jurisdiction, illustrated the law of prize, extended the application of the principles of commercial law, and placed the law of trusts and charities upon a stable basis. He protected the States in the exercise of their lawful powers, in their exclusive right to interpret their own Constitutions and local laws, in their freedom from molestation under the Fifth and Eleventh Amendments, in their right to levy taxes upon the creatures of their own sovereignty. In United States v. Judge Peters,[1] in the Trial of Aaron Burr, in Fletcher v. Peck,[2] in the case of the Nereide,[3] in McCulloch v. The State of Maryland,[4] in Trustees of Dartmouth College v. Woodward,[5] in Sturges v. Crowninshield,[6] in

(1) 5 Cranch, 115.
(2) 6 Cranch, 87.
(3) 9 Cranch, 389.
(4) 4 Wheaton, 316.
(5) 4 Wheaton, 518.
(6) 4 Wheaton, 122.

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Osborn v. Bank of the United States,[1] in Gibbons v. Ogden,[2] in Wilson v. Blackbird Creek Marsh Company,[3] in Brown v. The State of Maryland,[4] in Craig v. The State of Missouri,[5] in Barron v. The Mayor of Baltimore,[6] in Ogden v. Saunders[7] and in Worcester v. The State of Georgia[8] we recognize a magnificent range of adjudications which bear to our Constitutional jurisprudence the relative strength and majesty of the Rocky Mountains to our physical geography.

No words that we can use today can equal the plaudits of his contemporaries. Pinkney exclaimed: "I meditate with exultation, not fear, upon the proud spectacle of a peaceful review of these conflicting sovereign claims by this more than Amphictyonic Council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory increasing and brightening with age—of concord at home and reputation abroad." Charles Carroll, of Carrollton, the last survivor of the signers of the Declaration of Independence, and then upon the verge of the grave, wrote to Judge Peters: "I consider the Supreme Court of the United States as the strongest guardian of the powers of Congress and the rights of the people. As long as that court is composed of learned, upright and intrepid judges, the Union will be preserved and the administration of justice will be safe in this extended and extending empire." Horace Binney declared: "What, sir, is the Supreme Court of the United States? It is the august representative of the wisdom and justice and conscience of this whole people, in the exposition of their constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the People, the States and the Union." Henry Clay pronounced the Supreme Court to be "one of the few great conservative elements of the government." Webster spoke of it as "the great practical expounder of the powers of the government," and with awful solemnity declared, "No conviction is deeper in my mind than that the maintenance of the Judicial power is essential and indispensable to the very being of this Government. The Constitution, without it, would be no Constitution—the Government, no Government. I am deeply sensible too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the Judicial power is the protecting power of the government. Its position is upon the outer wall. From the very nature of

(1) 9 Wheaton, 739.
(2) 9 Wheaton, 1.
(3) 2 Peters, 245.
(4) 12 Wheaton, 419.
(5) 4 Peters, 410.
(6) 7 Peters, 243.
(7) 12 Wheaton, 213.
(8) 6 Peters, 515.

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things, and the frame of the Constitution, it forms the point at which our different systems of government meet in collision, when collision unhappily exists. By the absolute necessity of the case, the members of the Supreme Court become judges of the extent of constitutional powers. They are, if I may so call them, the great arbitrators between contending sovereignties." De Tocqueville said that "a more imposing judicial power was never constituted by any people." Lord Brougham did not hesitate to pronounce that "the power of the Judiciary to prevent either the State Legislatures or Congress from overstepping the limits of the Constitution, is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth." Sir Henry Sumner Maine spoke of it as "a unique creation of the founders of the Constitution," while Bryce, paraphrasing an expression of the Civil law, calls it "the living voice of the Constitution."

The title of the Court to the veneration and esteem of mankind does not rest alone on the peculiar character of its jurisdiction, or its powers, the wisdom with which they have been exercised, the learning and splendor of its bar, or the lofty character of the questions discussed. It rests largely upon the reputation of its Judges for purity, courage and ability—and of these John Marshall was confessedly first. He ranks with the greatest jurists of the Anglo-Saxon race. He is the peer of Hale and Hardwicke, and Mansfield and Stowell—nay, in the powers of constructive intellect, he was far greater than these. I would not abate one tithe from the just fame, or pluck a single leaf from the laurels of Bushrod Washington, Joseph Story, Brockholst Livingston, or William Johnson, nor would I undervalue the support given by the tremendous intellects of Pinkney, Webster, Dexter, Emmet, Wirt or Binney and Sergeant at the bar. But just as Washington, who had the aid of Greene, Wayne, Knox, Lafayette, or Steuben, will always command the largest share of praise for the military conduct of the Revolution, so will John Marshall, the Chief Justice at the critical and formative stage of our jurisprudence, command to the end of time the largest measure of reverence. His master mind dominated his tribunal, his world-wide reputation awakened admiration, his resistless logic coerced assent, his crushing weight of reason annihilated opposition, his authoritative judgments, his spotless rectitude, his unequalled term of service, the matchless veneration for his character, the unrivalled authority of his name, mark him as the undisputed head of the supremest of earthly tribunals—the foremost of our national jurists—the judge whose conduct "justified the wisdom of the Constitution, and reconciled the jealousy of Freedom to the Independence of the Judiciary."

The career of Marshall was indispensable to the existence of this government. Under Providence, he made it possible for it to become

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what it is today. Had a weaker mind, or one of different qualities, occupied the chair of Chief Justice from 1801 to 1835, the Republic would have failed in its development, and the Constitution would have been a mass of unexercised fat, instead of a living organism of nerve and sinew. His peculiar traits were those of a lawyer, statesman and patriot which in their triple union completed the frame of a great Constitutional judge and raised the government from a doubtful experiment to an assured success, and established it in the affections and confidence of the people. He was fortunate in his opportunities; he was great in his achievements, and employed his faculties in the creation of a system of jurisprudence which takes its place among the admired intellectual productions of the world. He reared a solid and magnificent structure destined to overshadow but not oppress the less elevated and less ambitious systems of justice of the several States. He accomplished his ends through the moral force which belonged to the independent position of the Judiciary. With no direct control over the sword or purse of the nation, with no armed force behind him, supported by no party obedient to his behests, with no patronage to distribute, and with no appropriations to corrupt a crowd of camp followers, removed from the reach of partisan influences, and protected by his life tenure from sudden gusts of passion, he wrought on in the quiet performance of his duty, without fear or favor, and relied for the results upon the reverence of the people for the majestic and final utterance of the Law, with a proud consciousness of his authority. He regarded himself as a high servant of Heaven, engaged in the noblest practical mission on earth, entrusted with the awful power of sitting in final judgment upon the rights of States and the liberties of individuals in the great Court of last resort under the Constitution of the United States.

The Supreme Court, under his guidance, has become the strength and glory of the Republic. The decisions of that Court, and the principles which they embody, constitute the foundations of our institutions —foundations which neither the earthquake of revolution can shake, nor the eruptive fires of civil war destroy. So long as that court maintains its lofty teachings, so long as the maxims of interpretation and the principles which underlie its work are true to the landmarks established by the great Chief Justice, so long will a pledge exist that the liberties of America will prove immortal.

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Editorial

The one hundredth anniversary of the day upon which John Marshall took his seat as Chief Justice of the United States, February 4, 1901, was appropriately commemorated by the Bar of the city of Cleveland. Mr. Hampton L. Carson, a distinguished Philadelphia lawyer and author of a "History of the Supreme Court of the United States," delivered the principal address of the day, upon "Marshall in His Relation to the Establishment of the Supremacy of the Supreme Court of the United States as an organ of Constitutional Interpretation," before a large audience at the Chamber of Commerce. Judge E. J. Blandin, President of the Cleveland Bar Association, presided over the meeting, and with him on the platform were many of the judges and leading members of the local Bar. The faculty and students of the two local law schools attended in a body. In the evening the Bar of the city banqueted at the Colonial Hotel, Frank N. Wilcox acting as toastmaster. The following toasts were responded to: "John Marshall and the Western Reserve," Judge W. W. Boynton; "If Marshall were in Washington," John H. Clarke; "The Constitution the best work of free men," Judge Stevenson Burke; "Nisi Prius Courts," Judge Francis J. Wing; "Wig and Gown," F. A. Henry, and concluded by a response from Hampton L. Carson, the guest of the day.

When we consider how few public men, even among those who have occupied the presidential chair and been distinguished in the army and navy, are remembered by the nation in the manner in which John Marshall day has been observed throughout the country, we be-

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gin to appreciate the greatness of John Marshall. Insomuch as Marshall cared nothing for popular applause, and of necessity came before the public merely by means of formal legal opinions, this fact is all the more remarkable. It would usurp the purpose of the address, which so eloquently told of the great Chief Justice's service to his country, and which may be found in full in this issue of the JOURNAL, to attempt to explain or comment upon the great problems with which he was confronted and the manner in which they were solved. Marshall, like the great interpreters of the common law, Glanville, Littleton and Coke, will always be remembered, because he built the foundation upon which the American system of constitutional government rests.

Comments.

Governmental Function—As a Defense in Admiralty.—The Supreme Court of the United States, in the case of Workman v. City of New York, 21 Sup. Ct. (Dec. 1900) 212, refused to apply the general rule which exempts municipal corporations from liability for the negligence of their servants while acting in a governmental capacity. A fireboat, the property of the city of New York, while responding to a call, negligently collided with the vessel of the plaintiff, which was moored to a dock, and an action *in personam* was brought in admiralty against the city for damages. A recovery was had in the District Court, which was reversed by the Circuit Court of Appeals, and the latter judgment was reversed by the Supreme Court, four judges, Justices Gray, Brewer, Shiras and Peckham dissenting.

Although the question has been passed upon by the courts of a large number of the states of the union and the uniform holding is that a city is not liable for the negligence of members of its fire department while engaged in their official duties, Farley v. New York, 152 N. Y. 222; Fire Ins. Patrol v. Boyd, 120 Pa. 624; Frederick v. Columbus, 58 O. S. 538; Wilcox v. Chicago, 107 Ill. 334, and Heller v. Sedalia, 53 Mo. 159, yet the Supreme Court holds that these cases are not authorities in a court of admiralty, and that in the maritime law municipal corporations are not protected against liability in the performance of governmental functions. The court, by Justice White, says: "But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon." After a review of the authorities, the court arrives at the conclusion that "the public nature of the service upon which a vessel is engaged affords no immunity from liability in a court of admiralty," in short that the theory of *sovereign attributes* of a city, does not obtain

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in the maritime law. The case can be easily disposed of on the theory of *stare decisis*, yet it would have been much more satisfactory, had the court given some good reason, why the rule which is so universally accepted among the state courts should not be applicable in courts of admiralty. The following suggestion is made as a possible explanation, that all persons, whether municipal or private, enter upon the high seas as equals, and, as the state's jurisdiction is lost, so also the relationship of sovereign and subject ceases, and therefore the doctrine that "*salus populi suprema lex*" should not be applied against a person to prevent a recovery, on the ground that the municipality was acting in a governmental capacity.

Constitutional Law—Impairing the Obligation of Contracts.—Under the statutes of Minnesota, certain railroads were allowed to hold their property exempt from taxation, on condition of their paying to the state a percentage on the gross earnings. In 1896 the law was amended, depriving the railroads of the exemption, but continuing the obligation as to the gross earnings. Held, that this act impaired the obligation of the former contract, and therefore contrary to the Constitution of the United States.

Stearns v. State of Minnesota, 21 Sup. Ct. 73.

The court held, that as the exemption was permitted by the Constitution of the State of Minnesota, the act permitting the same constituted a valid contract between the State and the railroad company. The constitution of Minnesota gives the legislature the power to "alter, amend and repeal" its acts. The Supreme Court holds, that this power must be subject to the limitation, that in its exercise no person shall be deprived of his property without due process of law, and that, where a person has been granted an exemption from taxation, to deprive him of that right and at the same time to preserve that part of the contract in favor of the State in its entirety, is not due process of law. It is admitted, however, that the whole provision as to railroad taxation might have been wiped out and a new system inaugurated, or that the percentage of the gross receipts might be increased, but the court denies the right of the legislature to amend the act, so that the State is relieved from its promises, while the railroad is held to its obligations. The effect in this decision is to materially restrict the power to alter, amend and repeal, and is an important decision upon this question.

Contracts—Fraudulent Representations—Expression of Opinion.—The case of Buena Vista Co. v. Billmyer, 37 S. E. (W. Vir. Dec. 1900) Rep. 583, presents very forcibly the distinction between a fraudulent misrepresentation and a mere expression of opinion. What

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amounts to fraud is always a question to be determined by circumstances, and cases involving the question of its presence will never cease to arise. Billmyer purchased of the plaintiff a number of pieces of real estate situate in the town of Buena Vista, paid part of the purchase price on the day of the transfer and gave notes—the subject of this action—for the balance. In his plea, he sets up that he was promised by the president of the plaintiff company that there should be constructed a steel plant, and told that the company expected to erect at least 75 houses in the vicinity of the lots at once. Neither the steel mill nor the houses were constructed, and $400 damages over and above the amount of the notes is claimed, by reason of the failure. Held: that there was no misrepresentation, and judgment for plaintiff on the notes.

The sale was made without warranty, the statements being made before transfer. The defendant claims to have relied on the statements and by them was induced to purchase. Nothing can be misrepresented that does not exist. The word itself implies present or previous existence of a fact. The statements in this case had only to do with the expectations of the company, consequently nothing was misrepresented. The intention of the company could be misrepresented, but it appears that it was not, as it is shown that the most conservative member of the company anticipated a boom. A mere expression of opinion may relate to matters past, present or future, and where the statement relates to a matter "the means of information upon which a fair judgment can be predicated—are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment for himself—the representation is clearly a mere expression of opinion." This is the test suggested in 2 Addison on Torts, 422.

Matters of opinion may or may not be given with the intention that they be relied on, and the complaining party relies on them at his peril. Expressions of opinion are generally involved in contracts of speculation. That there is misrepresentation in such cases is quite improbable, and the court says in this case, "defendant banked on another man's opinion and lost."

Torts—Fright.—In the case of Gaskins v. Runkle, 58 N. E. (Ind. App.) 740, the plaintiff sought to recover for injuries resulting from fright and mental shock, caused by the defendant's going upon the land of the plaintiff's husband and quarrelling with him, and using abusive language. The plaintiff was in ill health. Defendant knew of her condition and that his conduct would shock her. On demurrer to the complaint the court held that no action would lie.

The court adhered to one of its former decisions, Railroad Co. v.

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Stewart, 56 N. E. (Ind. App.) 917, where a mother seeing her daughter exposed to great danger on account of the defendant's negligence, became frightened, the fright causing nervous prostration. Liability was also denied in several other cases. Spade v. Ry. Co., 168 Mass. 287; Ward v. West Jersey & S. R. Co., 47 Atlantic (N. J.) 561. In this latter case a gate-keeper at a railroad crossing let down the gates before the plaintiff had passed entirely over, subjecting him to danger of being run over by an approaching train, whereby he was shocked and paralyzed. The court said that the ground of the decisions denying liability is "that a person is responsible only for the natural and proximate results of his negligent act; that physical suffering is not the probable or natural consequence of fright in the case of a person of ordinary physical and mental vigor, . . . and we have a right to assume in the absence of knowledge to the contrary that such persons are of average strength, both of body and of mind." If this is the law, the fact that the defendant had knowledge of the condition of the plaintiff, as in Gaskins v. Runkle, would probably make a difference as to his liability. In Railroad Co. v. Stewart, above cited, no such knowledge of plaintiff's condition, on defendant's part, appears, nor in Ward v. West Jersey & S. R. Co. It is said that redress cannot be afforded in many cases, because of the inadequacy of methods and means of courts to reach just and adequate results with sufficient certainty. Kalin v. Railroad Co., 47 N. E. (Ind. App.) 694. But in that case it did not appear that the injury for which recovery was sought was more than the fright itself unaccompanied with nervous prostration or other resulting physical injury. Where such fright results in nervous prostration or other sickness confining a person to his bed for months, rendering a physician's care necessary, it would seem that in such a case the damage could be ascertained with as much certainty as where one is directly injured by the application of force on the part of the defendant. It would seem, therefore, if the plaintiff could show an actual physical injury, which a man of ordinary prudence might anticipate would be the result of his act, the fact that the injury was brought about by a shock or fright, and not by physical violence, should not prevent a recovery.

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Notes on Ohio Decisions.

Depositions — The Right to Take as Distinguished from the Right to Use.

The case of Ex Parte Miller, 11 O. D. 69 (Hamilton Common Pleas, 1901), deals with an interesting question concerning depositions, which has not been free from doubt, i. e., in regard to the interpretation to be given to secs. 5243, 5265, and 5266 Rev. State. The first provides that "A party may be examined as if under cross-examination, at the instance of the adverse party, either orally or by deposition, as any other witness." The second enumerates the cases in which the deposition of a witness may be used, viz.: Where he does not reside in, or is absent from the county in which the action is pending; where he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; where the testimony is required upon a motion, or where the oral examination of the witness is not required. The third provides that "Either party may commence taking testimony by deposition at any time after service upon the defendant." Questions arising upon these provisions are: Whether the right to *take* depositions is limited to those cases in which a deposition may be *used;* whether the provisions of secs. 5265 and 5266 apply alike to witnesses and parties to the suit; whether under the guise of a deposition a party may go on a "fishing expedition" for evidence.

Upon the first of these questions Ex Parte Miller holds that the right to take a deposition is entirely distinct from the right to use it at the trial, and that, therefore, the circumstances which would authorize its use, as enumerated in sec. 5265, need not be present at the time the deposition is attempted to be taken; so that, for instance, while a deposition cannot be *used* unless the deponent is absent from the county, it may be *taken* although he is present and has no intention of removing. Upon this proposition the authorities in Ohio are, with one exception, in accord; In Re Nushuler, 4 Dec. Re. 299, 1 Clev. Law. Rep. 249 (1878); Shaw v. The Ohio Edison Installation Co., 9 Dec. Re. 809, 17 Bull. 274 (n. d.); State Ex Rel v. Cost, 10 Dec. Re. 619, 22 Bull. 250 (1889); Meader v. Root, 5 C. D. 61, 11 C. C. 81 (1895); Thomas v. Beebe, 8 O. D. 231, 5 N. P. 32 (1897); Contra, Ex Parte Langford, 9 Dec. Re. 597, 15 Bull. 267 (1886).

Upon the question whether the provisions of secs. 5265 and 5266 apply alike to witnesses and parties, Ex Parte Miller holds in the affirmative. A similar ruling was made in the case of State ex rel v. Cost, *supra*, and in In Re Robinson, 9 O. D. 763, 7 N. P. 105 (affirmed by circuit court, 10 C. D. 797, 19 C. C. 716 (1900). The question also

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came before the courts in the following cases: In Re Pfirman, 1 O. D. 177, 1 N. P. 127 (1894); In Re Humphrey, 7 C. D. 603, 14 C. C. 517 (1897); Thomas v. Beebe, 8 O. D. 231, 5 N. P. 32 (1897). But while in each of these cases the objection was made that the proposed deponent was neither absent from the county nor unable to attend court, the main objection was that the deposition was not sought in good faith, but merely in an effort to "fish" for testimony. In all three cases the right to take the deposition was denied, the courts laying stress upon the fact that there was an apparent effort to fish for evidence.

Upon the question of fishing for evidence, Spiegel, J., in In Re Miller says: "This would not give the court the right to judicially legislate away the effect of a law." The same view is taken by Taft, J., in Shaw v. Ohio Edison Installation Co., *supra*,—"To this it may be said that it is an argument more properly addressed to the framers of the law than to the courts construing it." See also the remarks of Smith, J., in State ex rel v. Cost, *supra*, and of McElroy, J. In Ex Parte Langford, *supra*,—"If plaintiff had the right to take the deposition of L., it matters not, so far as this question is concerned, whether he was in good faith or not." For the contrary view see the cases cited above, In Re Pfirman, In Re Humphrey, and Thomas v. Beebe; in the latter case Bigger, J., says: "It was not the legislative intent when provision was made for the taking of depositions that it might be used for the purpose of discovery."

Such are the authorities; it will be seen that they are uniform on none of the propositions passed upon in In Re Miller. It is believed, however, that Miller's case announces the better view upon each point. The question is one of statutory construction purely; what the legislature has *said*, not what it might or should have said. Upon the first question there seems no room for doubt; the right to use the deposition under certain contingencies includes the right to prepare for those contingencies. That the legislature must have so intended is apparent when it is considered that one of the contingencies authorizing the use of a deposition is the death of the witness. It may, however, be objected that while the right to prepare for these contingencies may exist, the witness should not be subjected to the annoyance of a deposition unless there is a probability that the deposition will be available at the trial. This was undoubtedly the theory of the old Chancery practice under which it was necessary to file a bill *de bene esse* or to perpetuate testimony and obtain a decree of court, in theory at least, before a deposition could be taken; Langdell's Equity Pleading, secs. 201, 202; Story's Equity Pleading, secs. 303, 309. And in such bills, of course, it was necessary to show a probability that the oral testimony would be unavailable at the time of the trial.[1]

(1) [See Vol. 3 of this JOURNAL, page 36, for a Circuit Court case on this question reported by Frank S. McGowan.—Editor.]

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Recent Cases.

CARRIERS—INJURY TO PASSENGER ALIGHTING—CONTRIBUTORY NEGLIGENCE.—Where a train went beyond the station platform, and a passenger, instead of requiring the conductor to back the train up, chose to alight where the train was standing, she took the risk and cannot complain that the place was not suitable for alighting.

Louisville & Nashville R. Co. v. Keith, 58 S. W. Rep. (Ky.) 468.

CARRIERS — PASSENGERS—NEWSBOY.—Action for damages for personal injuries received by a newsboy while selling papers on the footboards of a moving car. While thus engaged he was struck by the tongue of a wagon, which had been left standing in the street, and was knocked off and fell under the trailer. The newsboy was in the habit of jumping on and off the defendants' cars without hailing to stop the car to receive him, or signaling to stop to allow him to alight, which clearly indicated that he had no intention of paying fare. Held: In no sense did he become a passenger, and the carrier is not under obligation to observe toward him the same degree of care that the law requires to be observed towards a person in the hands of the carrier to be transported.

Padgitt v. Moth, et al., 60 S. W. (Mo.) 121.

CONSTITUTIONALITY OF SPECIAL LAWS— UNIFORMITY OF TAXATION.—In 1895 the legislature of Indiana passed an act providing for the re-location of the county seat of Jackson county. The proposed change was voted down by the electors, whereupon steps were taken to bring the matter up again, and on the refusal of the county commissioners to order a second election this suit was brought to compel such action. The demurrer involved the constitutionality of this special act of the legislature, by which funds for the erection of the court house and jail were to be levied on all taxable property in the township to which the county seat should be removed. The Supreme Court held that such a tax was in contravention of the constitution, which provides that taxes for state, county, or township purposes should not be imposed under a special act.

Board of Commissioners v. State, 58 N. E. (Ind.) 1037.

The general law of the State requires that jails and court houses be maintained by the counties. As the legislature may not suspend the operations of that law by a special act, it follows that this act imposing a tax upon the township that by the general law belongs to the county, is unconstitutional. It contravenes that part of the constitution which says that taxes for a county purpose must be imposed uniformly throughout the county. The same doctrine is laid down in two Ohio cases: Wasson v. Commissioners, 49 Ohio State 622; and Hubbard v. Fitzsimmons, 57 Ohio State 436. The latter case came up from Cuyahoga county and involves the constitutionality of the act under which the Central Armory in the city of Cleveland was built.

CONTRACT—ASSUMING DEBT OF THE FIRM.—Action brought by the plaintiff to recover from the defendants certain moneys due and owing to him from the firm or co-partnership of Randolph & Clowes, which the defendants had agreed with the co-partnership to be answerable for. It appears that there was a co-partnership of Randolph & Clowes and at the death of Randolph, one of the partners, the partnership was dissolved. The co-partnership owned certain property and owed certain debts. Soon after the dissolution of the firm, the surviving partner and the administrator of Randolph caused the defendant corporation to be organized and agreed to turn over all the property owned by the said partnership to the defendant corporation upon the corporation agreeing to answer for all the debts then due and owing by the said co-partnership and to save the estate of Randolph and his administrator and the surviving partner harmless therefrom. Held: That the obligation between the defendants and the co-partnership was an obligation which the defendants were bound to fulfill only as to that co-partnership, and that the plaintiff not being a party to that agreement could not complain, if the defendants did not choose to abide by the agreement, as the defendants were not in any way obligated to plaintiffs.

Morgan v. Randolph-Clowes Co., 47 Atl. (Conn.) 658.

The court maintains that the contract was made solely for the benefit and advantage of the immediate parties, and therefore the creditors can bring no

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action upon it. This is not the general rule in this country as the court admits, although it seems to be well established by a long line of decisions in Connecticut.

CONTRACT—PAROL—STATUTE OF FRAUDS.—By a parol agreement, it was expressly understood that the plaintiff, a child, should be supported, educated, and maintained during her lifetime by her adopted father, and that at his death she should receive the share of his estate to which she would have been entitled had she been his own offspring. The child was transferred into the family of the decedent and assumed the relation of daughter. Held: That there was sufficient part performance to entitle the plaintiff to specific performance.

Healy v. Healy, et al., 66 N. Y. S. 927.

As the contract gave the plaintiff a share in the realty as well as the personality, the statute of frauds would have prevented a recovery, except for the provision of the New York statutes, 2 Rev. Stat. p. 1885, §10, which reads that "nothing in this title contained [Statute of Frauds] shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in case of part performance of such agreements." In absence of such a statutory enactment, the opposite conclusion would have followed, as in Shahan v. Swan, 48 O. S. 25, where, upon practically the same facts, a recovery was denied.

DEAD BODIES — PROPERTY THEREIN.—Action by deceased's wife against one Snyder to recover the dead body of plaintiff's husband. Deceased had separated from the plaintiff, his wife, and during the latter years of his life he lived with defendant. He made a will which provided that on his death the "manner, time and place of his burial should be according to the wishes" of Snyder. Court held that "One has no property in his dead body, so that he can dispose of it by will. In the absence of statute, the custody of the corpse and the right of burial belong to the next of kin, and not to the executor or administrator."

Enos, et al., v. Snyder, et al., 63 Pac. Rep. (Cal.) 170.

It seems to be quite well established that in the absence of statutory provisions, there is no property in a dead body; that it is not a part of the estate of a deceased person, and that a man cannot dispose of that which, after his death, will be his corpse. Williams v. Williams, 20 Ch. Div. 659. There is a conflict in the American decisions on this point, but the majority of the decisions are in harmony with the above case. O'Donnell v. Slack, 123 Cal. 285. In Larson v. Chase, 47 Minn. 307, it is held that in absence of testamentary disposition, the body goes to the next of kin.

EVIDENCE—OPINION AS TO DUE ATTESTATION OF WILL.—Plaintiffs resisted probate of will, claiming want of due attestation. The propounders offered testimony of several persons—persons acquainted with the deceased and the arrangement of the rooms of his dwelling—as to the possibility or impossibility, in view of the testimony of the subscribing witnesses, of the deceased seeing those witnesses sign the paper. Held: Testimony admissible.

Burney, et al., v. Allen, et al., 37 S. E. (N. C. Dec., 1900), Rep. 501.

The majority of the court say that such testimony is statement of fact, rather than the expression of an opinion. Such a decision seems absurd, and as stated by a dissenting judge, "it is too plain for argument, that a witness cannot be allowed to do the work of the jury." In giving the testimony, the witness was compelled to pass upon the truth of the subscribing witnesses as they had testified. Suppose they had perjured themselves; what would be the value of the testimony allowed? In McLaughlin v. Webster, 141 N. Y. 76, at page 85, the court says: "The plaintiff's counsel offered to show by a witness that a person sitting at a table in the sitting room could not hear the conversation on the porch in front of the room between the deceased and the executor, which the latter testified to. The proof offered was excluded and * * we think it no error for the location and distances were fully described and the referee could draw the conclusion as well as the witness."

HIGHWAYS — ADVERSE POSSESSION.—Where a land owner erects a fence on what he supposed to be the correct line of a highway, and remains in peaceable possession of the inclosed land for thirty years, he acquires title by adverse possession to such line, as against the county, and may enjoin an interference

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with the fence by a road supervisor, who claims that it incloses a portion of the highway.

Axmear v. Richards, 84 N. W. (Iowa) 686.

The case rests on a decision (Washa v. Brown, 78 Iowa, 432), asserting that "while possession of an adjoining owner's land by mistake and without intent to assert title thereto is not adverse, yet acquiescence in a certain line, with possession up to it, for a period of ten years, is conclusive evidence of an agreement on it as the true line, and will bind the parties concerned."

INJUNCTION—COVENANTS IN LEASE.—Appellee, a manufacturer of beer, leased certain premises to appellant. As a part of the consideration the appellant covenanted to sell no other beer on the premises except that manufactured by the appellee. It was conceded at the time the covenant was made that it was to inure to the benefit of the appellee. Action to restrain breach of the covenant. Held: That injunction is the proper remedy and that the covenant is not void as against public policy.

Ferris v. American Brewing Co., 58 N. E. (Ind.) 701.

INTERSTATE COMMERCE — CONCLUSIVENESS OF STATE DECISIONS.—The decision of the highest court of the State of Kentucky sustaining the constitutionality of the statute requiring separate coaches for white and colored passengers, on the ground that the act applied merely to transportation within the state, constitutes a determination of the local law, which is binding upon the Supreme court of the United States.

Chesapeake & Ohio Ry. v. Kentucky, 21 Sup. Ct. 101.

Merely the question whether such a law is contrary to the interstate commerce act, was raised, and the civil rights feature of the case was not involved. This question has already been decided in the case of Louisville Ry. Co. v. Mississippi, 133 U. S. 587. In Plessy v. Ferguson, 163 U. S. 537, a similar statute was attacked on the ground that it denied the colored person the equal protection of the laws as guaranteed by the fourteenth amendment, but was held to be constitutional and sustained.

LARCENY—INTENT.—Prosecution for the larceny of a horse hired by the defendant, an insurance agent, for the day. His business dealings carried him to a neighboring town where he was detained as a witness for several days, when he was arrested. Held: That the evidence failed to show a felonious intent at the time of the hiring.

Stillwell v. State, 58 N. E. (Ind.) 709.

To constitute larceny where the owner of property voluntarily parts with it, it is essential, first, that the owner intends to receive the identical thing back, and second, the person taking possession must intend at the time to deprive the owner of the thing delivered. Kellogg v. State, 26 O. S. 15.

LIBEL — CONTAGIOUS DISEASE — LEPROSY.—In an action for falsely publishing that defendant had leprosy, the contention that science has established that the disease is not contagious but only hereditary, is no defense, the term remains libelous, since it tends to cause one to be shunned and excluded from society, even conceding that it is not a contagious disease.

Simpson v. Press Pub. Co., 67 N. Y. S. 401.

MASTER AND SERVANT — INJURY TO THIRD PARTY.—Plaintiff accepted the invitation of the defendant's night-watchman to visit defendant's ice factory at night to see the process of making ice. The plant was running night and day and the building was lighted by electricity. While in the building, the watchman and other employes, for the purpose of a practical joke, turned off all the lights, caused steam to escape with a loud noise, uttered cries, and at the same time dragged a coal shovel over the iron stairs about the engine, so frightening the plaintiff that, in the rush to escape, he fell from a platform onto which he had hurriedly come, and was injured. Held: Defendant not liable.

Canton Cotton Warehouse Co. v. Pool, 28 So. (Miss. Dec., 1900), Rep. 823.

That the acts of the watchman and other employes were totally disconnected with their employment and the business of the defendant company, there is no doubt. The question in such cases is, whether or not the act was done in the execution of the master's business within the scope of his employment. In Richie v. Waller, 63 Conn. 155—a case cited by plaintiff—the servant was driving

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home with the master's load, went a round-about way home to transact business for himself, left the horses and they ran away, causing injury to plaintiff. Held: Master liable. The distinction between the cases is that the acts of the servants in perpetrating the joke were wholly out of line of their employment. The master is not, necessarily, not liable because, as the court says, "their acts were done for their own purposes."

NEGLIGENCE — COUNTY — GOVERNMENTAL FUNCTION.—For the proper management of a county reformatory, it became necessary to have a mule and wagon. Held: That no recovery could be had against the county for the negligent handling of the same, as the county was exercising a governmental function.

McAndrews v. Hamilton Co., 58 S. W. (Tenn.) 483.

The principle is well recognized, that a county is merely a political or governmental division of a state and should enjoy the same immunity as the sovereign state while acting in its proper sphere. Its liability is limited to contracts and does not extend to torts for the negligence of its employes.

NEGLIGENCE — DELAY IN DELIVERING TELEGRAM — DAMAGES.—The plaintiff instructed his agent by telegram to cease buying hogs. The defendant failed to promptly deliver this message and the agent bought hogs at $5.41; the next day the price fell to $4.55. An action was brought to recover the difference between the price at which the hogs were bought and the price at which they could have been bought on the next day. Held: That the defendant's failure to deliver the message made it liable and that the measure of damages was the difference between the purchase price and the market price at the time the plaintiff had been informed of the mistake and had instructed his agent to sell.

Western Union Tel. Co. v. Packing and Provision Co., 58 N.E.(Ill.) 958.

The measure of damages would have been different had the agent authority to sell; in that case it would have been his duty to sell upon the decline of the market and thus minimize the loss. Here the agency was a special one for the purpose of buying only.

NEGLIGENCE — FELLOW SERVANT — EMPLOYEE OFF DUTY.—Plaintiff, an employee of the defendant street car company, while riding on one of its cars, was injured through the negligence of the motorman. Plaintiff was not on duty at the time, but was taking advantage of a rule of the company allowing employes to ride free. Held: That motorman was not a fellow servant so as to preclude a recovery from the defendant, but was entitled to be treated as a passenger.

Dickinson v. West End St. Ry. Co., 59 N. E. (Mass.) 60.

The material question is whether at the time of the accident plaintiff was in the service of the defendant. The facts showed that he took no part in the management of the car and that the car on which he was riding was not on the line on which he was employed. The case was distinguished from Gilshannon v. Railroad Co., 10 Cush. 228, where a common laborer, who was employed in repairing defendant's roadbed, rode gratuitously to and from the place of employment on defendant's gravel train, was held to be a fellow servant, on the ground that here the plaintiff was under no obligations to ride upon this particular car and at the time he was injured was at liberty to go where he pleased.

NEGLIGENCE—FIRES ON RIGHT OF WAY — TURNTABLE DOCTRINE.—Action was brought to recover damages for the death of a child, burned while playing at a fire set to stumps on defendant's right of way. Held: That the defendant was not bound to exercise due care to so guard the fire on its right of way that children intruding thereon could come not in dangerous contact with it, though induced to do so by its attractiveness.

Erickson v. Great Northern Ry. Co., 84 N. W. (Minn.) 462.

In Kiffe v. Ry. Co., 21 Minn. 200, there had been such a duty imposed on the corporation in cases of turntables. This case defines and limits that decision "to cases of attractive and dangerous machinery, and to other similar cases, where the danger is latent." The court refused to extend the doctrine to the present case.

NEGLIGENCE — TURNTABLE DOCTRINE.—Action for damages for killing plaintiff's intestate, a boy about 9 years old, who was playing about a pile of railroad ties, when some of them fell upon him and he was fatally injured. The

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ties were piled lengthwise, not crossed or "cribbed," and on an unused portion of a street near where the railroad crossed. Held: Defendant liable.

Kramer v. Southern R. R. Co., 37 S. E. (N. C., Dec., 1900,) 468.

The doctrine of the turntable cases was not involved, it is said, as a pile of cross-ties was not especially attractive, nor was it as a general rule dangerous; but that the company in piling the ties on the road, must be considered a trespasser, whereas if the injury had occurred on railroad property no liability could attach. The case is based on this distinction, that the company is under no obligation to guard against injury to children where the children are trespassers and the turntable doctrine does not apply, but when the company is guilty of a trespass in placing its ties on a highway, the obligation not to injure the public who have a right to use the highway, applies. As the plaintiff was a child of nine years, the defence of contributory negligence might not prevent a recovery, so a new trial was ordered.

RAILROADS—ACCIDENT AT CROSSING—GATES.—Where it is the custom of a railway company to keep gates or a flagman at a dangerous crossing, the raised gates or the absence of the flagman, to a traveler to whom the custom is known, is an assurance of safety, and an implied invitation to make the crossing, upon which he may to some extent, but not entirely, rely and act within reasonable limitations, upon the presumption that it is safe for him to go upon the crossing. The extent to which he may rely on such assurance is a question of fact for the jury, unless it conclusively appears that he relied exclusively thereon.

Woehrle v. Minn. Transfer Ry. Co., 84 N. W. (Minn.) 791.

In accord with the above case is that of Railway Co. v. Schneider, 45 O. S. 678, in which it was held that a person had a right to consider that an open gate was notice that the track was clear and that it was safe to cross.

RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.—This action was brought by decedent's administrator to recover damages for his death. The evidence showed that the decedent could not see the approaching train because of obstructions along the track. It also appeared that he was in full possession of all his faculties, that he was familiar with the crossing in question, and that he did not make any effort to find out whether or not a train was coming before venturing upon the track. Held: That the failure of the persons in charge of the train to give the signals required by statute to be given when approaching a crossing, will not excuse a traveler from exercising such precautions as a reasonable man ought to take under like circumstances.

Railway Co. v. Thomas, 58 N. E. (Ind.) 1040.

The circumstances of this case show that the decedent was utterly lacking in that care which he ought to have exercised. The failure of the engineer to whistle at the crossing, although an act of negligence, would not make the railroad liable when the plaintiff is also guilty of negligence.

WATER AND WATER COURSES— ALLUVIUM.—Plaintiffs owned certain land situated along the Juniata river, and by reason of the flowing of the river in its natural course certain sands were deposited in large quantities upon the lands of the plaintiff yearly, which were a source of revenue to the plaintiff. This profit was cut off by reason of the defendant railway company building an embankment which occupied not only the bank of the river, but extended out and over the high-water mark, and the waters encountering this artificial obstruction no longer deposited the sand upon the land of the plaintiff, but carried it on down the river. Held: That the plaintiff had a right to use the land bordering upon the river between the high and low-water mark as long as he did not obstruct navigation. And as the plaintiff had been deprived of a source of revenue and the farm has lost its most valuable incident, defendant was held liable in damages.

Freeland, et al., v. Pennsylvania R. Co., 47 Atlantic (Pa.) 745.

WILL — WHAT CONSTITUTES.—A paper, in form, a warranty deed, contained a clause in this language: "To have and to hold the above described premises to the said Bryant P. Wynn, of the second part, his heirs and assigns, to be his at my death and the death of my wife." Held: Not testamentary in character.

Wynn v. Wynn, et al., 37 S. E. (Ga., Nov., 1900,) 378.

The court says that the doubt as to the character of the instrument is always to be resolved in favor of that construction which will make the instru-

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ment operative. Such a rule is undoubtedly proper, but it is too often resorted to before exhausting every means at hand to explain away the doubt; that is to say, it would seem that such a rule is allowed to override the rule that to determine the true character of a doubtful instrument we must read the intention of the maker by the light of the transaction itself, as shown by the provisions of the writing and all the attendant circumstances. In this case the instrument was held to be a deed. In every respect it was in the form of a warranty deed, except the wording of the habendum clause before referred to. The rule seems well established in Georgia, that this amounts to a conveyance of the "fee *in praesenti*, with the right of possession and enjoyment postponed to the death of the grantor." Goff v. Davenport, 96 Ga. 423; Gay v. Gay, 108 Ga. 739.

Book Review.

Atlas and Epitome of Diseases Caused by Accidents. By Dr. Ed. Golebiewski of Berlin. Translated and Edited with Additions by Pearce Bailey, M. D. New York. 600 pages, $4.00. W. B. Saunders & Co. Philadelphia, 1900.

This work suggests itself at once to the legal profession as a valuable contribution to personal injury and medico-legal literature. It is a New Testament pioneer in the rapidly growing and distinctive realm of damage law. Likewise it fills a big recess in the cavern of what lawyers don't know about the anatomical nature, extent and *sequellae* of accident injury. The surgeon is usually relied upon to furnish the information, consequently expert testimony is regarded today with suspicion. Its farcical reputation is due largely to the ignorance of the bench and bar upon the subjects which form the basis of it. This new work is designed to be the lawyer's anatomy—his attending physician—presenting to him fully and clearly that knowledge of injuries and their effects upon the human body so essential in successful negligence litigation. It deals with many hundred actual cases of injured employees, their history and subsequent development. This field is profusely illustrated with no less than 40 colored plates, life-like in perfection, and in addition nearly 150 illustrations, most of which are X-ray photographs of fractures and injuries to the bony skeleton. The text is intensely plain and practical in its treatment of a technical subject. Fracture, dislocations, burns, bruises, contusions, lacerations, bumps and functional disorders of every conceivable sort, resulting from accident, are discussed and illustrated from a rich field of experience. How valuable, then, is a work of this character to those whose interests bring them in touch with the relations of master and servant? To railroad and accident insurance corporations, extent and permanency or seriousness of the injury is of quite as much concern as the question of liability. To form a correct judgment therein, a practical knowledge of the human anatomy and the effect upon it of traumatic influences and the functional disabilities caused thereby is absolutely indispensable.

R. B. N.

Books Received.

The Legal Property Relations of Married Parties: A Study in Comparative Legislation. Isador Loeb, Professor of History in the University of Missouri. New York: The Columbia University Press, 1900.

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THE

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John Marshall and the Western Reserve

HON. W. W. BOYNTON

John Marshall's most valuable services to his country consisted in firmly establishing the doctrine, that the United States under the Constitution was a government supreme in its sphere of action. This principle he found to lay at the foundation of that instrument, and he so declared it, an interpretation unswervingly followed by the Supreme Court ever since. While an examination of the cases, and the very forcible reasoning by which they were supported, that fixed the principle asserted so firmly in the jurisprudence of the country, would be an interesting work, I direct attention for a few moments to another class of services rendered by him of inestimable value to our immediate neighborhood—rendered as a representative in Congress the year before he took his seat as Chief Justice of the Supreme Court of the United States.

It is well known to students of our early history that the title to the territory known as the Western Reserve, was for a long time in dispute. It was said to be included in the description of land embraced in the charter by James I to the London Company, later known as the Virginia Company, in 1609. That charter commenced its boundaries at Point Comfort on the Atlantic and run south 200 miles; thence west across the continent to the Pacific; commencing again at Point Comfort and running 200 miles north from this point "west and northwest throughout from sea to sea." This line it was claimed ran through Pennsylvania and New York, crossing the eastern end of Lake Erie, terminating in the Arctic Ocean. In 1620 James I by letters patent granted to a body of men, known as the Council of Plymouth, all the territory lying between the 40th and 48th degree north latitude, bounded on the east by the Atlantic and on the west by the Pacific. Here was another description in the Massachusetts charter that embraced the territory known as the Western Reserve. In 1662 Charles II granted a charter to a company commonly known as The Connecticut Company. The boundaries of the land were Massachu-

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setts on the North, the sea on the South, Naragansett River or Bay on the East, and the South Sea on the West. The Pacific ocean was then known as the South Sea. The Western Reserve lay entirely within this description. Later, in 1664, Charles II. ceded to his brother, the Duke of York, afterwards James the II., a strip of territory which was claimed to extend west into the Mississippi Valley, covering a portion of the Western Reserve lands. The Colonies or States having no domain beyond their immediate State boundaries, stoutly maintained that the title to all outlying territory was in the United States, or the United Colonies, as a result of the successful termination of the Revolution, brought about by the common labor and sacrifices of all. Here was an unhappy confusion of boundaries and title, giving rise to conflicting claims to the soil of the Reserve. Subsequently, in pursuance of an impressive appeal from Congress, these various States, to pacify the public mind, ceded to the United States the lands described in their respective charters lying outside of their State lines with a few individual reservations. New York made its cession in 1780, Virginia in 1784, Massachusetts in 1785, Connecticut in 1786, the latter State leaving out of her description of the property ceded the territory now known as the Western Reserve, which, exclusive of the Fire Lands, Connecticut, in 1795, sold and conveyed to persons afterwards known as the Connecticut Land Company. Later on great uneasiness manifested itself concerning the validity of the title that the Connecticut Land Company acquired, arising out of the fact that if Virginia, or Massachusetts, or New York, or the United States had the better title, the Land Company acquired none as Connecticut's grant to the company was by quit-claim deed. Its title was questioned in a variety of ways.

In 1797, St. Clair, Governor of the North West Territory, included the Reserve in the County of Jefferson, a thing he had no right to do, unless the soil of the Reserve belonged to the United States and fell under the control of the ordinance of 1787. The Connecticut Land Company, disputing the right of the United States to extend jurisdiction over them, appealed to the Legislature of Connecticut for an act constituting the Western Reserve a county with proper and suitable laws, to regulate the internal policy of the territory for a limited period of time, the same to be administered at the sole expense of the proprietors. This petition Connecticut denied. The situation became embarrassing as time elapsed. If Virginia's original title was good she had passed it to the United States; the title claimed by New York and that claimed by Massachusetts, as well, had been ceded to the United States. The United States had not relinquished any title she held by virtue of the treaty of peace with England, or by virtue of the cessions made to her by Virginia, New York and Massachusetts.

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This was the situation in 1797-8, when the Legislature of Connecticut authorized its Senators in Congress to execute in the name of the State a deed releasing to the United States the jurisdiction of the Reserve. At the next session of Congress the Senate passed a bill to effect the acceptance of this release, but Congress adjourned before the House acted upon it. In February, 1800, a committee was appointed by the House of Representatives to report upon the expediency of accepting Connecticut's offer of the release of jurisdiction of the Reserve to the United States. John Marshall, then a Representative in Congress from Virginia, was made chairman of that committee. His report was thorough and exhaustive. It gave a history of the charters, the action of the several States under them, the acceptance by the United States of the Connecticut cession with the Reserve left out; the sale to the Connecticut Land Company; their payment of $100,000 interest on the purchase money with the expenditure of $80,000 for survey and improvements. The embarrassment of the company was stated by him and the committee in these words:

"As the purchasers of the land commonly called 'The Connecticut Reserve' held their title under the State of Connecticut, they cannot submit to the government established by the United States in the North Western Territory without endangering their titles, and the jurisdiction of Connecticut cannot be extended over them without much inconvenience."

The report advised the acceptance of the offer of jurisdiction on the terms and conditions specified in a bill accompanying the report. The bill passed. It authorized the President to execute and deliver to the Governor of Connecticut, letters pattent, conveying the right, title and interest and estate of the United States to the territory commonly called the Western Reserve, "for the purpose of quieting the grantees and purchasers under said State of Connecticut and confirming their titles to the soil of said tract of land upon the condition," among others, "that Connecticut should release to the United States all jurisdictional claim over the Reserve." This bill met violent opposition in both houses of Congress. It was strenuously opposed by many members from New York and Pennsylvania, and by Randolph of Virginia. Their opposition was technical and largely upon historical grounds. In the view of the members from New York and those opposing the measure from Virginia, the passage of the bill would be to recognize the validity of Connecticut's claim whose charter was subsequent in date to Virginia's, and also to that of Massachusetts, the Virginia charter covering, as claimed, the same territory, and the Massachusetts charter covering it without doubt. Marshall, however, in a vigorous argument, carried the day over all opposition, securing the passage of the bill through the House. Considerations of expediency, and a desire to relieve an embar-

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rassing situation and prevent what seemed a great wrong to the land company, and those who had purchased a portion of the Reserve from it, doubtless had much to do with the earnestness of Marshall's support. With him justice was the queen of virtues.

The Reserve was clearly within the description contained in the Connecticut charter. The call in the Virginia charter, running from the Atlantic "West and Northwest throughout from sea to sea" was at least ambiguous. The Reserve was clearly not embraced within the charter to the Duke of York. Massachusetts was in favor of Connecticut's claim. For the Connecticut Land Company, and the purchasers from it, the case was one of great emergency. If the bill had been defeated and Connecticut's title ultimately held void and eastern emigration checked, what a different people would have inhabited this south shore of Lake Erie? President Adams executed the required conveyance and thereby the question of civil government for the Reserve restoring peace to its inhabitants was permanently settled. Their title to the Reserve having now become quieted the influx thereafter into the Reserve, of eastern inhabitants, was very rapid and permanent. There is no doubt that Marshall's great support of the bill was the controlling factor in securing the passage of the bill and in the adjustment reached of the complex and difficult situation. He, however, was equal to the occasion. He threw his whole power into the support of the bill. The vast interest of those who had invested their money in the purchase on the strength of the Connecticut title, and the seeming recognition by the United States of the validity of that title, arising out of the acceptance of the cession by Connecticut of her Western lands with the Reserve left out, and the added fact that no one was to be injured by recognizing such title, were, to Marshall, facts of deep significance, and secured from him the most vigorous and powerful support to the bill introduced to set the troublesome question at rest. He brushed away all technical refinements in his march to a just end and solved the Western Reserve problem in a practical and common sense way. Hence, to John Marshall, the lawmaker and statesman, are the people of the Western Reserve indebted for services of the most valuable character.

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Proceedings in Error.

1—AT COMMON LAW.

F. B. WILLIAMS.

It is now little short of half a century since the Code of Civil Procedure went into effect in Ohio,[1] and some thirty-two years since our present criminal procedure was adopted;[2] time for the passing of the generation then active on the bench and at the bar. There are but few members of the bar now living who were really familiar with the old practice, substantially that of the common law of England, with modifications in the direction of simplicity. With the present generation of lawyers the distinctive characteristics of our existing procedure as compared with that of the common law naturally tend to become obscured and forgotten. But that an understanding of these things is necessary to any thorough appreciation of the practice of to-day, or to any sound estimate of its value, no one will be disposed to deny. It should, therefore, serve some useful purpose to recall briefly in these pages the essential features of at least one branch of common law procedure, namely that in error, and contrast them with the practice which has for these many years taken its place in this State. In dealing with the common law on this subject it seems desirable to speak not merely of the common law of Ohio, but also of that of England.

The procedure in error known to our law, whether common or statute, is peculiar to the English-speaking peoples, and is more directly the product of ancient Germanic ideas than might commonly be supposed. The essential characteristic of this procedure is the principle that the verdict of the jury, acting within its province, is final. A retrial of the issues of fact in the higher court, as in the appeal of the Civil Law adopted in the Ecclesiastical Courts and Chancery, is according to this principle impossible. Only "errors of law" may be reviewed, and such errors of fact as are not committed by the jury. If there is such error of law, (of errors of fact it will be convenient to speak separately), and the proper judgment cannot be given without a new trial, such new trial must be had in the lower court, and the case be remanded to it for that purpose. Now there is probably no reason founded on the nature of things why the verdict of the jury should have this character of finality, and one might indulge till doomsday in *a priori* reasoning about the matter without coming on the true explanation, which seems to be historical and which is certainly archaic in its picturesqueness. From the start the verdict of the jury is coordinated with the absolute and final proof of the older modes of trial. It is easy to comprehend why the ancient trial by battle, or ordeal, or compurgation even, should be final, involving as each did a submission of the controversy to super-

(1) The Code of Civil Procedure was adopted March 11, 1853.
(2) The Code of Criminal Procedure passed the Legislature in 1869.

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natural power, originally that of the pagan gods, later that of the Christian Deity. Indeed the common term for trial by battle was *judicium Dei.*[1] The judges of England who had to deal with the jury in its infancy could not easily conceive of a finding of fact that was not final. So the verdict from the beginning takes its place, in a certain sense, among these old formal modes of trial, inasmuch as it is absolute proof.[2] When it is further remembered that the early jury for centuries went on its own knowledge, and without the presentation of evidence to it in court, the resemblance between the jury and the more ancient methods of trial is heightened, and the relationship of our modern ideas with the most ancient of our race made more apparent.[3]

But it will not do, in analyzing the causes which gave finality to the jury's verdict, to overlook other influences. At the beginning there was in fact, and for centuries thereafter in legal fiction, an arbitral element in the jury. The parties submitted to it by agreement, as they would to referees.[4] And finally the verdict was always regarded as that of the countryside (*patria, pays,*) rather than that of the twelve individuals.[5] Both ideas appear from the old-time formula whereby the pleaders who demand a jury trial "put themselves upon the country," a formula constantly recurring in the pleadings of our older Ohio practice. But it is unnecessary to pursue this subject further; it is enough to indicate thus briefly why our procedure in error has taken its peculiar form, so much unlike the *appellatio* of the Roman law.

At common law the ordinary process for the correction of errors was by writ of error; it was confined to courts of record,[6] and as most of our courts to-day are courts of record, particular attention will be paid here to this writ and the proceedings under it. It will suffice to dismiss with a few words the writs for reviewing the proceedings in other courts. In the case of courts not of record the proper writ was that of false judgment,[7] a writ of much greater antiquity than the writ of error; in its original form it was a proceeding against the judges below, charging them with wrongdoing,[8] but in modern English practice it came to resemble the proceedings by writ of error in nearly all respects except the manner in which the proceedings below were certified up.[9] It is believed that this writ never obtained a foothold in this country, but was supplanted by the writ of *certiorari*, which originally lay to correct error in a court not proceeding according to the course

(1) Pollock and Maitland's Hist. of Eng. Law, 2.
(2) Ibid. 2,624.
(3) Thayer's Prelim. Treat. on Evidence, c. 2 passim.
(4) 2 Poll. and Maitl., 620.
(5) Ibid., 2,621.
(6) "A writ of error is an original writ issuing out of Chancery; and it lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of any suit in a court of record." Co. Lit., 288b.
For the proceedings in general on a writ of error, see 2 Wms. Saund., 5 ed., 100(1) to 100(x), and 2 Tidd Pract., No. 1134 et seq.
(7) Co. Lit., 288b; Finch L., 484; 3 Black. Com., 406.
(8) 2 Poll. and Maitl., 660 et seq.
(9) 2 Tidd, Pr., 3d Am. (from 9th Eng.) ed., *1187-1189.

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of the common law,[1] a term which did not then by any means comprise all courts not of record.

In the case of courts of record it must be remembered that in ancient theory the record is the word of the king himself,[2] and so is not contestable except with his permission. The party, therefore, who complained of error (and only parties to the record were entitled to this writ)[3] was obliged to obtain from the king, through his Chancery, a writ of error, which was both a command to the lower court to send up the record, and a commission to the higher court to examine and correct such record.[4] When these terms "higher and lower court" are used, it is the ordinary and usual procedure in error that is had in mind, that to correct errors of law. It must be noted at once, however, that there is such a thing as error of fact, and a peculiar writ of error to correct it. The writ of error does not invariably cause the record to be sent up to a superior tribunal; in the case of errors of fact, so-called, the court in which such errors were committed is considered a fit tribunal to correct them, and in such cases the writ directs such justices to examine the record themselves.[5] If the writ is directed to the King's Bench, the examination of the record is said to be *coram nobis*, that is *coram rege*, since the King is supposed to sit in that court in person, as indeed he actually did for a long time after the Common Pleas split off from it.[6] In the case of other courts of record, as the Common Pleas, the writ to correct errors of fact is said to be *coram vobis*.[7] As all writs run in the King's name the use of the pronouns *nos* and *vos* in this connection is intelligible enough. The term "error of fact" is one which may easily mislead, and so calls for some little care in its definition. It means any mistake as to those facts which are essential to jurisdiction, such as that the plaintiff was a married woman, or that the defendant was an infant and appeared by attorney instead of by guardian, or that the defendant was dead at the time judgment was rendered.[8] Such errors do not, of course, appear on the record, but must be shown by extrinsic evidence. And as they are almost always, if not invariably, mistakes for which the trial judges are not responsible, the latter are considered suitable persons to correct them; "for reversing (such error) is not reversing their own judgment."[9]

Stephen has pointed out carefully that "errors of fact" in this connection does not cover mistakes made by the jury in those facts essential to support their verdict, saying that in the English law there is no

(1) Fitzherb. Nat. Brev., tit. certiorari; 1 Tidd, 398.
(2) 2 Poll. and Maitl. 666; 7 West. Res. L. J., 12.
(3) Cannon v. Abbott, 1 Lev. 210; Vaughan v. Lorlman, Cro. Jac. 138; Ognel v. Paston, Cro. Eliz. 165; Burton v. Eyre, Cro. Jac. 288.
(4) 2 Bac. Abr. 187; 1 Stra. 607; 2 Ld. Raym. 1403; Welsh v. Brown, 42 N. J. L. 323.
(5) 2 Tidd, *1136-1137.
(6) 2 Tidd, ibid.
(7) 2 Tidd, *1137.
(8) Steph. Plead. 3rd Am. Ed. 143; Bird v. Pegg, 5 B. & Ald. 418; King v. Jones, 2 Ld. Raym. 1525.
(9) Co. Lit. 288b.

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appeal from the jury.[1] And that undoubtedly was the strict rule of the common law; even newly discovered evidence did not affect the verdict. It is this character of finality in the verdict which gave our procedure in error its peculiar form, as has already been pointed out. But for the past two centuries or thereabouts, it should be observed here, this ancient immunity of the verdict has been disturbed, and the old province of the jury encroached on. The trial judge is now obliged to scrutinize the evidence as it is put in, and may be required, on motion for new trial, to decide whether the verdict could, in view of that evidence, have been reached by any rational process. He is, of course, not to consider what finding he would have made himself, but whether rational men could have arrived at the verdict in question. According as he passes on this, he will let the verdict stand and overrule the motion, or set the verdict aside and grant a new trial. And furthermore his decision either way is reviewable in a higher court. Now it is to Professor Thayer that we owe a clear understanding of the fact that when a court passes on what rational men might do, it passes on a question of fact, or of reason, but it does not decide any question of law.[2] However, since this question is passed on by the court it is almost invariably spoken of in practice as a question of law, and since any error in deciding it is apparent on the record (*i. e.*, from the bills of exceptions) it is classed among errors of law, and consequently is not reviewable by the trial court, but by the superior tribunal. But aside from this case it would seem that such other errors as appear on the face of the record are really errors of law, and since it is the duty of the trial court to examine the whole record before giving judgment,[3] errors of this kind are fairly said to be committed by the court itself, and therefore the writ directs the record to be sent up to the higher court. This is the ordinary proceeding in error and the writ is called writ of error simply, as distinguished from that *coram nobis* or *coram vobis*. In civil cases no allowance of the writ was necessary, as the writ was one of right, and grantable *ex debito justitiae*.[4] The English books do, indeed, speak frequently of allowing a writ of error, but the act of allowance is purely ministerial, being performed by the clerk of errors (the cursitor of Chancery) for the county, who on application enters the writ as allowed, as a matter of course, and gives the applicant a certificate to that effect.[5] In criminal cases the writ was grantable as of right in misdemeanors, on probable cause being shown to the attorney-general;[6] but in capital cases the writ was held to be a matter of favor, and not of right.[7]

(1) Steph. Plead. 142.
(2) Thayer, Prelim. Treat. on Ev., c. 5.
(3) Steph. Plead. 143.
(4) Reg. v. Paty, 2 Salk. 503; Crosby's Case, 3 Wils. 193; Jaques v. Cesar, 2 Saund. 100, note 1; 2 Tidd, Pract. 1134.
(5) Van Antwerp v. Newman, 4 Cow. 84; Gravall v. Stimpson, 1 B. & P. 479, note a; Payne v. Whaley, 2 B. & P. 137; Sykes v. Dawson, Barnes 209.
(6) 4 Bl. Com. 392; Reg. v. Paty, 2 Salk. 503.
(7) 4 Bl. Com. 392.

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On the lodgment of the writ with the trial court it was the duty of the chief justice to sign the certificate of return, and the writ and a transcript of the record were then sent up to the court of errors.[1] According to the strict rule of the common law the original record itself must be sent up,[2] a requirement so undesirable and needless that it was long ago relaxed in practice so as to permit the use of a transcript,[3] and the practice so relaxed finally sanctioned by statute.[4] Originally it would seem that the mere allowance of the writ operated as a stay of execution,[5] but by statutes, beginning with 3 Jac. 1, c. 8, a recognizance with sureties became necessary to effect such *supersedeas*.[6] On the return of the writ the court of errors obtained jurisdiction,[7] and if the return were not made within the proper time a motion to dismiss was in order. If the record sent up was incomplete, the plaintiff in error might make representation to the court to that effect, i. e., suggest a diminution of the record, and obtain an order for a complete record.[8] After the defendant in error was before the court he might do the same up to the time of joinder in error, and in such case the suggestion was in effect a motion, calling for notice to the adversary and being supported by affidavit that the files, entries, or record below showed that the transcript was not according to their tenor.[9] If the motion was allowed, the court issued a *certiorari* to have the record perfected.[10] Diminution of record could not, of course, be alleged contrary to the record as transcribed,[11] since the court of errors has no jurisdiction to correct or alter the record of another tribunal; to effect that it is necessary to proceed before the lower court itself. To perfect the writ further, process in error, analogous to the summons in an action at law, must be issued and served on the defendant within the prescribed time.[12] At common law this process was called a *scire facias ad audiendum errores*, or in plain English a summons in error;[13] but it has always been common to waive such process, and that this may be done so as to give the court jurisdiction is well-established.[14] Once the defendant had appeared he might move to dismiss or quash on the ground of some informality or irregularity.[15] A frequent ground for this motion was a variance between the writ of error and the transcript or *scire facias*, or between the last two;[16] at common law such variance was

(1) Rochester v. Roberts, 25 N. H. 495; Mussina v. Cavazos, 6 Wall. 355.
(2) Fitzherb. Nat. Brev. tit. Error, Writ of.
(3) 2 Tidd, 1191, 8 ed.
(4) Steph. Plead. 142, note z.
(5) Ibid. note.
(6) Ibid.
(7) People v. Baron, 6 How Pr. 81.
(8) Bac. Abr. tit. Error; Pelletreau v. Jackson, 7 Wend. 481; State v. Reid, 1 Dev. & B. L. (N. Car.) 382.
(9) Pelletreau v. Jackson, supra.
(10) State v. Reid, supra.
(11) 2 Tidd Pr. 1167; Bac. Abr. tit. Error; 1 Roll. Abr. 764.
(12) Lloyd v. Alexander, 1 Cranch 365; Tandy v. Rowell, 54 N. H. 386.
(13) Tandy v. Rowell, supra.
(14) Enc. Pl. and Pr. 7,899, and cases cited.
(15) Ibid. 7,901.
(16) Ibid. 7,908.

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fatal, so far as the writ of error went, as it was unamendable, on the theory that it was in the nature of a commission, and that no court could amend its own commission.[1] But this was changed by the Statute of 5 Geo. 1, c. 13, for England,[2] and has long been changed, either by custom or statute, in most, if not all, jurisdictions in this country.[3] Any amendment, however, must conform to the record, since the court of errors cannot change that.[4]

The next stage in the proceedings was that of pleading, for at common law writs of error were governed by rules of pleading analogous to, and as well defined as, the rules of pleading in original actions in courts of original jurisdiction.[5] Corresponding to the declaration in an action at law was the assignment of errors made by the plaintiff;[6] this was by bill, reciting briefly the recovery of the judgment complained of and assigning or enumerating specifically the error or errors alleged to have been committed in the course of the proceedings in question;[7] *in hoc erratum est, scilicet*, etc. Properly speaking the term "assignment" applies to the pleading as a whole, each allegation being correctly described as a specification; but the looser practice of styling each specification an assignment has long been current.[8] One difference between the assignment and a declaration will be noted at once, viz.: that while a declaration pleads allegations of fact, an assignment sets forth conclusions of law. As to the sufficiency of the assignment, and the certainty required of each specification, it would be unprofitable to go into detail in an article of this kind. Suffice it to say that errors of fact and law could not be joined in the same assignment, for the obvious reason that each was reviewed in a different court.[9] In the case of errors of fact, the rule against duplicity was adopted, prohibiting the specification of more than one such error.[10] In early practice the assignment of an error in fact concluded with a verification, "*hoc paratus est verificare*," and for want of this the error could not be noticed.[11] Errors of law must confine themselves to the record,[12] and there is much law regarding the precision with which they must be set forth.

After the assignment was in, the defendant in error might demur or plead; and the plea in turn might be in abatement or in bar.[13] In

(1) Cooper v. Ginger, 1 Stra. 607.
(2) Enc. Pl. and Pr. 7,908.
(3) Ibid.
(4) Ibid. 7,911.
(5) Bolling v. Jones, 67 Ala. 508.
(6) Armstrong's Appeal, 68 Pa. St. 409; Williston v. Fisher, 28 Ill. 43; 3 Steph. Com. 644; 2 Burr. Pr. 147.
(7) 2 Enc. Pl. and Pr. 921.
(8) Elliott App. Proc. sec. 299, note 3; 2 Enc. Pl. and Pr. 921.
(9) Castledine v. Mundy, 4 B. & Ad. 90; 2 Enc. Pl. and Pr. 939.
(10) Jaques v. Cesar, 2 Saund. 101, q.
(11) Castledine v. Mundy, supra; King v. Gosper, Yelv. 58; Sheepshanks v. Lucas, 1 Burr. 410.
(12) 2 Enc. Pl. and Pr. 965.
(13) Bolling v. Jones, 67 Ala. 508. For the course of Pleading to an assignment of error coram nobis, see Crawford v. Williams, 1 Swan (Tenn.) 341; Memphis Germ. Sav. Inst. v. Hargan, 9 Heisk. (Tenn.) 496; Jones v. Pierce, 12 Heisk. 281.

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case improper assignments were made, a demurrer was proper, as where errors both of fact and law were specified.[1] But the common joinder, *in nullo est erratum,*[2] was the usual pleading made in error cases. It has been common to compare this plea with the demurrer to an original action at law, on the theory that both admit the facts alleged, and put only the law of the case in issue.[3] If the transcript be regarded as a part of, and the gist of, the first pleading in error,[4] it is obvious that the common joinder does resemble the demurrer, since it admits the record and only raises the point of law that the record shows no error. But if the plea be regarded as going to the assignment alone, and that be considered as a pleading distinct from, though founded on, the record, and peculiar in this that it alleges conclusions of law rather than matters of fact, it is plain that the common joinder corresponds almost exactly with the general issue. Any matter of fact avoiding the error assigned may be pleaded specially, as a release or waiver of errors.[5] Once the issue is made up, the case comes on for hearing or argument, according as the issue is one of law or fact. If the judgment below is reversed, the reviewing court may enter the proper judgment itself where no new trial is necessary, as where the pleadings are fatally defective in substance. If a new trial is needed, a mandate issues to the lower court to take such further proceedings. On the other hand, if the judgment below is affirmed, a mandate issues directing the trial court to carry into effect its judgment, i. e., the affirmed, not the affirming one.

It is proposed in a future article to deal with the law of Ohio on this subject, both before and under the code, and it will be more convenient and profitable to avoid further detail until then.

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(1) An assignment joining both errors in fact and errors in law is bad for duplicity, and not as a misjoinder; hence can be reached only by special demurrer. Moody v. Vreeland, 7 Wend. 55; Jeffry v. Wood, 1 Stra. 439; 1 Roll. Abr. 761 (E) pl. 1; Holdy v. Hodges, 1 Sid. 147; Burdett v. Wheatley, 2 Ld. Raym. 883; Brents v. Barnett, 3 Bibb (Ky.) 251.

(2) 2 Enc. Pl. and Pr. 969.

(3) Lansdale v. Findley, 1 Hard. (Ky.) 158.

(4) "An assignment of errors . . . did not constitute a part of the transcript, but was founded upon it, and was filed in the appellate court at, or subsequent to, the time of filing the transcript." Per Sawyer, J., in Hutton v. Reed, 25 Cal. 478.

(5) For precedents and citations on these as well as other special pleas in error, see 7 Enc. of Forms, 766 et seq.

For forms generally relating to this whole subject, see 7 Enc. of Forms, 711 et seq.

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Wherein Does Equity Follow the Law and Wherein Does Equity Not Follow the Law.

WILLIAM O. MATHEWS.

In the early history of the English law courts before the present splendid development of legislative and judicial precedents, the legal maxim played an important part and was a formidable weapon. But the rapid progress of a nation, accompanied by multitudinous changes and complications, has perfected a system of jurisprudence in which the early legal maxims have been relegated to "glittering generalities," as one writer expresses it. At this day a lawyer waging a suit on the strength of a naked maxim would be literally torn to pieces by exceptions, qualifications and statutory regulations. However, maxims still exist as principles universally admitted as being just; they inspire the law and remain and watch over it; they are the result of ages of legal favor and represent the reason of the law.

It is this latter that accounts for the survivorship of certain fundamental rules which are still used for the guidance of courts of Equity. The ethical basis of Equity has ever been its most substantial vindication; being a system based entirely upon conscience, it is flexible and by certain maxims has a discretionary power; it is preeminently a science, and like any other science it starts with and assumes certain maxims which are supposed to express the fundamental doctrines of the science. This discretionary power, however, exists only in Equity; at Law the procedure has necessarily become arbitrary and limited to its precedents and enactments which it must follow and apply with scarcely a chance for discretion or reason; in an action at Law every party must stand upon his strict legal rights, and the court is bound to give the remedy which the Law has provided.

One of the most important of the maxims of Equity is "Equity follows the Law," "*Aequitas sequitur Legem*"; it is of this maxim we will deal in the following pages, trying to discover its true meaning and scope in the complex system of which it is so important a part. Our efforts will be to discover wherein in the system of Equity Jurisprudence the Law is followed and wherein the Law is not followed; no branch of Equity will be found so interesting, and certainly none so important, as it involves the very foundation of the extent of Equity jurisdiction. Mr. Justice Story points out that the maxim is true only in a limited sense, and that it is subject to many variations and exceptions.[1] This no doubt is true, and it will be found that the maxim has

(1) Story, Eq. Jur., 1, § 64 a.

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by the various writers met with a virtual refutation as far as its practical character is concerned; but we will discover that it has entirely survived as to its reason, and that the variations and exceptions merely show the wonderful adaptability of Equity to every set of circumstances in which a wrong is involved.

Before proceeding with our investigation it will be necessary that we form a definite idea of the scope and meaning we will give to the terms Law and Equity as used in the maxim. What is Equity? What is Law? These questions might be answered in various ways, as the terms mentioned have different meanings according to the way they are used. In its broadest sense, Law may include every relation which arises from the nature of things of whatever kind or description. In this sense all beings have their laws, God has his laws, the material universe has its laws, animals have their laws, man has his laws; from this point of view the idea of a command from a superior to an inferior is not necessarily involved. Another view of the term Law may be found in the books which refers to its application to human affairs; the rules and methods by which society compels or restrains the actions of its members, the Law of the Land.[1] This arises from a necessity vital to the very existence of a nation of people that their relations to each other should be guided in every way by Justice, enforced by authoritative power.

In England, from whose system of jurisprudence our own has in general been derived, this idea of enforced justice between men is carried out by the principles and procedure set forth in the Common Law, a stupendous work gathered together from reports, essays, commentaries and digests of early writers and judges, comprised of much judicial legislation, together with acts of the early legislatures. Supplementing this Common Law is the jurisdiction of the High Court of Chancery, which acts from principles of conscience, which system has grown to immense proportions and importance, from necessity alone, to carry out the principles which the Common Law had sought for but in which it was from the nature of things deficient, namely, to give an adequate remedy wherever a wrong was committed.[2]

The fact that there are courts of Law and courts of Equity tend to mislead to the view that the systems are entirely dissimilar and that each is administered without regard to the other. This view is entirely erroneous, and it must now be our object to point out wherein they harmonize and wherein they differ, for it is in this point that we will get at a solution of our problem, wherein Equity follows the Law and wherein Equity does not follow the Law. In order to get at this under-

(1) See Bouvier Law Dictionary.

(2) See Spence, Equity Jur., 321; Walker, Amer. Law, p. 53, Stephens Pleading (Andrews), p. 27.

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standingly it will be necessary to examine the nature and theory of each of the different systems and compare them closely.

Irrespective of all courts, man seems to have an intuitive sense of a distinction between right and wrong; but to carry out the idea of Justice to its fullest and truest extent would involve nothing short of infinite knowledge and goodness. Were man endowed with this infinite knowledge and goodness, all would be agreed and courts and express Laws would not be needed; but the wisdom of man being finite and limited, differences of opinion exist and the result of this is a code of express laws in an effort to settle it once and forever. In England, as we have seen, such a system of express law arose from the established customs and usages of the realm, which were gradually acted upon by the legislatures and judges and became precedents. These precedents and written laws were in theory founded upon reason and justice and hence were capable of being added to, as the growth of a nation required. If a question arose in regard to which no provision or precedent could be found, the judge consulted the general public policy of the people and the principles of natural justice; if the circumstances called for it he made a new decision. A succession of judges passed upon these new rulings and in this way new precedents were established. Thus grew up the common law of England; its development was slow, but in course of time a system of precedents and legislative acts was established, and it became difficult to make new precedents without interfering with those that had already been established; the common law became a system regarded as complete, and having as its maxim, *Ubi jus ibi remedium;* to a great extent a *lex scripta*, positive and inflexible.[1] This, as far as it applied to any particular locality, and as far as its rules are considered binding upon any community, together with the enactments of the legislatures, which are from their nature, binding upon the community, we may assume to make up the meaning of the term Law, as used in the maxim, Equity follows the Law.

The Law, as stated, was considered as complete a system as could be made and which the judges could no longer enlarge. It was positive and inflexible, and there was now no remedy for a wrong unless it came within the established rules. As we shall presently see, such a system of set forms and rules could not in its nature accommodate itself to every case that might arise; the very fact that the gradual development of the system was the result of necessity shows that new cases would continue to develop where an arbitrary set of rules would not afford complete justice. The faculties of man and his power of language are limited and consequently incapable of anticipating or prescribing for all the various and complicated questions of right and wrong arising

(1) Spence Eq. Jur., 321, Walker, Amer. Law, p. 53.

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out of the intercourse and transactions of men with each other by laws adapted to every emergency as it may arise. Hence, the best and most perfect code of laws produced by human wisdom and sagacity must ever be defective and incomplete.[1] The *lex scripta* has reduced into definite propositions so much justice as the experience and knowledge of man has enabled him to comprehend and apply to the various exigencies of society; but justice or Equity in its broad sense cannot be wholly reduced to positive rules and cannot be entirely comprehended therein. There still exists an unexpressed justice to which the minds and consciences of men must and will ever recur. It is in this broad sense that we shall treat of the term Equity: a system which alone is adequate to provide a remedy for every wrong between beings, at least, for such wrongs as, in their nature, can be enforced by human tribunals. To carry out the objects of Equity the Common Law courts are used where the proper remedy is to be found in that part of Equity which has been expressed in the Common Law or in Statutory Law, and the Chancery Courts are used where the remedy is not to be found there.

As we have seen, the term Law includes the Common Law of England and all legislative enactments which are binding upon the people; we have seen how these have risen, and also have noted the necessity for the application of further principles in order to insure a perfect system of jurisprudence. This jurisdiction is exclusively exercised by the Court of Chancery, and as the history of a subject is necessary in order to thoroughly understand its principles, we will review hastily the important steps in the wonderful rise and development of the High Court of Chancery in England.

The writers differ as to the origin of Chancery Jurisdiction. Originally the administration of justice in England was vested in the Aula Regis, or Great Council of the King. This became dissolved, and as much of its jurisdiction as could be reduced to rules was delegated to the new courts which had been formed, namely, the Court of Common Pleas, King's Bench and the Exchequer Court. These Courts, however, were required to confine themselves strictly to such rules as were delegated to them, and could not give a remedy where a rule did not cover the case. This early common Law of England was positive and inflexible, and, as we have seen, such a code of laws could not be expected to meet the requirements of every case. The King had always been at the head of the Great Council, which in a limited way had dispensed justitce according to the circumstances and merits of the particular case, and it is but natural then when cases arose, where injustice resulted from the application of the rules of the Law Courts, the King took cognizance of such cases in person; and in cases where the abuse

(1) The Common Law of England together with the statutes in force in England were naturally adopted by the early colonists of this country, and when the severance from England came, they were retained as far as the conditions of the colonies would permit.

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was very apparent began to depart from the law and to give a remedy based upon his own sense of justice. Mr. Justice Story accepts this theory[1] and it is probably correct; its correctness can make but little difference, however, as such a separate or extraordinary jurisdiction which could dispense justice according to the merits of the particular case must from necessity have arisen in some way. It is but natural that this discretion went to the King, and he began to decide such cases according to his conscience, where the set rules of law did not give an adequate remedy. As the cases became more numerous, the King began to delegate his extraordinary power to his Chancellor, who was one of the most exalted and conspicuous personages of the state; he was often the highest of the church dignitaries, and the confidence of the sovereign being reposed in him, it is but natural that he was chosen. Being an ecclesiast, he was led to study, and was versed in the Roman Law, that exhaustless mine of philosophy, which furnished him with theories and remedies well adapted to the complicated subjects of inquiry. This extraordinary jurisdiction in one individual might well menace the very existence of a government differently constructed, but so long as the King was recognized as the fountain of justice and honor, so long was he able to administer justice contrary to the Courts without fear of the usual danger of dispensing with the law of the land.

From the time of William the First the power of discretion in his decisions gradually arose in the Chancellor and in the reign of Richard the Second, his Chancellor, John De Waltham, turned this discretion to great account and made it the means of greatly enlarging his power and may perhaps be said to have laid the foundation of an Equity Jurisdiction in a separate Court of Chancery. Statutes of Mortmain had been passed forbidding ecclesiastical corporations from acquiring property. The clergy regarded this with disfavor, and soon contrived to evade such statutes by causing land to be transferred to a third party, who thus held the legal title but was under obligation to hold the same to the use of the corporation. Under the strict rules of Law, such obligation in favor of the corporation could not be protected, but the Roman Law furnished the means for a decision by the Chancellor that a distinction existed between the right of actual possession and the right to the beneficial enjoyment, and he held that the one having the beneficial interest must be deemed to be the true owner. Thus the Chancellor had the means to outwit the unlawful acts of the clergy, and to make it effective he invented a writ of Subpœna by which the one so seized to the use of another was compelled under a penalty to appear before him and answer under oath. This gave solidity and permanence to the jurisdiction of the Chancellor; perjury was punishable and it made truth more certain.

(1) 1 Story, Eq. Jur., §49.

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Another step in advance was the victory of Lord Chancellor Ellesmere over Sir Edward Coke in the reign of James the First which secured to Chancery the power to control by Injunction the effect of judgment in Courts of Law. It was at first thought that this would bring the different Courts of the kingdom into opposition and collision, but such view was found to be erroneous. The injunction did not go against the Court but merely against the party securing the judgment; it was merely the case of a party holding a legal right subject to the control of Chancery. When a larger measure of justice was needed than the simple legal judgment could give, Chancery added this necessary additional measure; it was but furnishing more complete justice and was no cause for conflict or jealousy.

The rise of this extraordinary jurisdiction was opposed vehemently by such learned men as Spellman, Coke, Lambard and Selden, but many doctrines became established, if not by positive enactment, by that common consent and custom upon which all the courts of justice in the kingdom were founded, and the advance of Chancery was rapid from the reign of Henry the Sixth.[1] In Henry the Eighth's time, Cardinal Wolsey expanded it into a still broader jurisdiction; then came Lord Nottingham, adding his wisdom and genius and giving it still new character, until the books speak of him as the "father of Equity." After Nottingham, came Lord Hardwicke to whom was left the rounding off; these sages had made a complete system of Equity Jurisdiction for the Chancery Court, which, had it at any time been arbitrary, was certainly now reduced to a system founded upon the very nature of justice and capable of an expansive power to meet all exigencies.[2] The Roman, the Saxon, the Dane, and the Norman had, in turn, brought their customs and their learning into the channel from which this higher development of the law of England grew. The nation grew; men's wishes became stronger; and the jurisdiction of Chancery swelled into gigantic proportions.

In the early history of Chancery there was perhaps much to justify the idea of narrowness, as the awards of the Chancellor were often the results of arrogance.[3] If the present Court of Chancery does really act as many ingenious writers have supposed, it would rise above all law, either common or statute, and be the most arbitrary legislator in every particular case.[4] Mr. Justice Story, in commenting upon this, says: "So far, however, is this from being true, that one of the most common maxims upon which a Court of Equity daily acts is, that Equity follows the Law, and seeks and guides itself by the analogies of the Law."[5] Among the decisions of the Equity tribunals there will no doubt be

(1) Jeremy Equity Jur., Introduction.
(2) See Story Eq. Jur., 1, § 49.
(3) 1 Story Eq. Jur., § 21.
(4) 3 Blackstone Com., 433.
(5) 1 Story, Eq. Jur., § 19.

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found some that are erroneous or conflicting, or for other reasons unsatisfactory, but these are accidental blemishes to be laid to the charge, not of the system, but of the infirmity of human judgment.

As a system, Equity is expansive and far reaching and it is not arbitrary according to caprice or fancy. The first weaknesses have been removed and it is no longer dependent upon the conscience of the particular Chancellor which, to use a quaint but a very happily applied illustration of old, may accidentally be good, bad, or indifferent, as the measure of his foot may be short or long. The Chancery Courts which enforce those principles of Equity not expressed in the written law, are guided and restrained by the precedents of previous decisions of the Court applicable to the subject in hand in precisely the same way that Law Courts are governed by such precedents.[1] These decisions are the recorded judgments of the highest judicial wisdom and are not to be disturbed, for it has been said that an uncertain law is even more intolerable than an unjust law.

We have said that the principles showing the necessity of separate Chancery Courts, were derived from the Roman Law; it will at once be interesting and instructive to note a close comparison between the development of jurisprudence in England and that of the Roman Empire. The student finds that, in fact, our system traces back and we are drifting closer and closer to the models furnished by that wonderful people who at one time ruled the civilized world.

Certain it is that the Praetor originally had but ordinary jurisdiction which he administered by the aid of the judex, or jury, and we find that side by side with this ordinary jurisdiction, there grew up an extraordinary jurisdiction, in the exercise of which he decided both the law and the facts without the interposition of the judex, and unhampered by any technical requirements as to the proper formula or action; in the exercise of this extraordinary jurisdiction he was enabled to act upon principles of conscience. They had their interdicts which answer to our injunction; they had restitutions, by which a person was restored to his former position. They had also the trust estate; insolvent estates were likewise settled by the Praetor; and to-day these will be found to be the most important and peculiar kinds of relief conferred by Chancery.

The same as in England, this extraordinary jurisdiction, after running side by side with the legal, grew in importance and in time became the only practical method in use; the same facts, the same underlying principles and the same course of development are shown in the history of the English Law. The Equitable jurisdiction of the Roman magistrates not only reacted upon the ordinary legal jurisdiction, introducing

(1) Cowper v. Cowper, 2 P. Wms., 753.

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more and more the influence of abstract right and justice, and sweeping away the ancient arbitrariness and devotion to external forms, but it gradually grew in magnitude until it became by far the more important of the two. Exactly the same process has gone on in England for centuries. The modes and notions of Equity gradually penetrated the common law tribunals; equitable principles were invoked in the decisions of legal actions; the common Law has become scarcely distinguishable in the underlying juridical forces which govern its movement, from the mass of doctrines which taken together are called Equity Jurisprudence. This comparison is certainly significant and must help us to understand the reason for the existence of the separate jurisdiction of the Chancery Court in England and in our own country as derived from the jurisprudence of England.

The analogy can be followed still further. In the Roman Law we see a culmination in the codification made under the direction of Justinian; and in 1875 we find by statute in England a similar development. All the courts are merged into one and distinctions between legal and equitable procedure are removed, and but one form of action is to be used in the administration of justice between private suitors. This great change had been effected in New York twenty-five years before and is in full and successful operation in more than half the States of this country.[1]

The development of the jurisdiction of Chancery Courts in America seems to have been somewhat tardy until Mr. Chancellor Kent brought to it his extraordinary learning; but in general it may now be said to conform to that of England.[2] While it is true that many of our States operate under a Code of Civil Procedure by which the distinction between the courts of Law and Equity is abolished, it must be remembered that while trials have been greatly simplified, the distinctions between Law and Equity can never be done away with. A trust can never be understood without knowing the distinction between the strict legal right and the equitable right of the *Cestui que Trust*; and were nothing else to stand in the way, the common law jury will always keep the dividing line clear and prevent an absolute unity of method.

After the discussion thus far of the principles and the development of the extraordinary jurisdiction of the Court of Chancery, we may say that Equity is that phase of natural justice which gives a remedy for every wrong according to the merits of the parties in interest determined from the particular circumstances of each case.

Now we have seen that wherever a remedy is given for a wrong done, the principle upon which such remedy is given is that of justice,

(1) Pomeroy Remedies, § 1-24, Spence Eq. Jur., 321.
(2) 1 Story Eq. Jur., §55.

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or Equity, which is the broad sense in which we have used the term Equity. As Law is but the expression of equitable principles, it must follow that Law is but the instrument of Equity. Mr. Justice Blackstone in his Commentaries says: "Equity is the soul and the spirit of all law."[1] It follows from this that Equity is the broader and includes Law, and where express laws exist they are a part of Equity which has been expressed in order that the propositions contained therein might be settled; the people either by that consent given by an existence through time immemorable or by special enactment have chosen to settle such doctrines once and forever, and it is plain that such should not be disturbed to meet the different opinions of people as to the reason or perfection of such expressed laws. It is indeed true that an unsettled law is more injurious to the public than an unjust law; in the latter case the public at least know what the law is and that it will remain, and can govern themselves accordingly, but an uncertain law could but bring chaos. If it is for the best interests of the public that laws should be settled, then naturally one of the leading principles in the general scheme of Equity should be that where an expressed law exists such law should be adopted and followed if it is the remedy that exactly fits the particular case.

The Law starts out by declaring that every wrong should have a remedy, but the accomplishment of this has necessitated an additional court with increased powers. When a wrong is to be redressed, the Law should be first applied and if it is clear that justice can be done, it should be followed; otherwise nothing would be certain. The Law administers natural Equity as far as its accustomed forms of procedure and strict judicial views will permit, but as we have seen, these are not sufficiently pliable to let in the operation of Equity to the full extent required; so that separate Courts of Equity have grown up side by side with Law Courts. They are more flexible and administer Equity in a more liberal manner. They are not independent systems, but, on the contrary, Equity includes Law and always seeks to discover how far the Law goes, or in other words, what view a Law Court would take, and then if there is a duty, or a right beyond what the strict law recognizes and which they can properly enforce or administer without infringing or contradicting the express Law, they will do so. For example: if a person has a full legal title which the Law recognizes and protects, if it is clear that in conscience he should apply that right or estate for the benefit of some other person, Equity will decree that the one who is entitled to the beneficial interest is the true one to be protected. In doing this, it does not contravene the Law or act in opposition to it, but something is decreed over and above, or in addition to the Law,

(1) 1 Blacks. Com., 61.

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where the Law alone is not sufficiently armed to do justice. Seeing that the person in whom the legal right is vested has a duty in conscience to perform annexed to that right, Equity compels the execution of the duty.

To further illustrate, let us suppose that the legislature should pass a Law saying expressly that hereafter the beneficial interest, in cases like the above, should be disregarded and that the one having the legal title should alone be protected and should not be compelled to perform the duty to the third person; Equity would then follow and allow the Law Courts to apply the Law as it has been expressed, and wherever a case came clearly within the intent of that expressed Equity it would be followed. Where a rule either of the common or statute Law is direct, and governs the case with all its circumstances or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it.[1] If the Law commands or prohibits a thing to be done, Equity cannot enjoin the contrary or dispense with the obligation. Thus, since the Law has declared in England that the eldest son shall take by descent the whole undevised estate of his parent, a Court of Equity cannot disregard this canon of descent, but must give full effect and vigor to it in all controversies in which the title is asserted.[2]

Another point to be noticed is that even while administering an additional measure of justice which is beyond the scope of expressed Law, Equity will still cling to the analogies of the Law and adopt its conclusions wherever it is possible to do so. Thus, there exist in Law, Statutes of Limitations; lapse of time must necessarily affect the rights of parties, hence Equity respects these statutes; it discountenances laches same as does the Law. Thus, it limited the relief sought on an equitable title to land, to the same time limit as prevailed at Law.[3] Again, in a series of limitations conferring trust or equitable estates, equity will hold that the cestui que trusts shall take the estates for the same duration as they would do in case the limitations were legal; while there are some cases where the trusts are executory, as in marriage articles, in which Equity will modify the limitations in order to affect the supposed intentions of the parties.

Another example is in the case of construing instruments; justice demands that the true meaning be ascertained, hence Equity follows the Law which makes the same demand.[4] In the case of uses before the Statute of Uses as well as express trusts since the Statute, or in the case of a tenancy for years, life or tail, or the case of an heir of an Use in land, the remedy in Equity is analogous to Law. Where lands were assigned in trust for payments of debts in the administration of the

(1) 7 Vesey 249, 1 Story Eq. Jur., § 64.
(2) Idem.
(3) Beckford v. Wade, 17 Vesey 99.
(4) Hatham v. East India Co., Douglas 277.

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trust by the court, judgments which affected the land by their own strength and nature and on which a remedy might be obtained at Law were directed to be paid according to their legal preference, Equity there followed the Law; the remedy in Equity was *utiles*, being merely substituted for the legal remedy which the creditor had on his judgments.[1]

Another illustration of the maxim may be drawn from the known analogies of legal and trust estates. In general in Courts of Equity the same construction and effect are given to perfect or executed trust estates as are given by courts of Law to legal estates. The incidents, properties, and consequences of the estates are the same. The same restrictions are applied as to creating estates and bounding perpetuities and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted.[2]

But as we have seen, there are many cases where Equity does not follow the Law. In many cases the right to redress is based upon some one of the technical equities which the Law knows nothing of; in other words, where the Law by reason of its universality does not reach the particular case and to apply the Law to the case would work fraud or injustice. In such cases, Equity will act upon rules of its own to carry out its principle that every wrong must have a remedy.[3] Thus, where a testator, in advanced years and ill health, induced his niece to reside with him as his housekeeper, on the verbal representation that he would leave her certain property by his will; he executed the will but revoked it subsequently, and Equity held that although the Law allowed him to revoke his will, still in Equity the land must be considered as held in trust for the niece.[4] Also, in contracts, the Law requires that a valuable consideration must pass between the parties, while Equity adopts a more equitable view of the obligation, in certain cases holding that meritorious consideration is good. Also, there are many cases where there is no analogous legal remedy, as cases of Trusts where Equity applies entirely its own principles,[5] still, however, following the analogies of the Law wherever it is possible to do so.

Generally, in matters involving legal estates, rights and interests, the Law is found to be adequate. And yet there are cases in which Equity will control the legal title of an heir general or special, when it would be deemed absolute at Law; and in which therefore, so far from following the Law, it openly abandons it. Thus, if a tenant in tail, not knowing the fact, should upon his marriage make a settlement on his wife, and the heir in tail should engross the settlement and conceal the fact, although at Law his title would be absolute, Equity would award

(1) 1 Spence Eq. Jur., 421.
(2) 1 Story Eq. Jur., § 64 a.
(3) 1 Spence Eq. Jur., p. 421, 2 id. 61. Waite Actions and Defences, p. 28. 1 Story Eq. Jur., § 33, § 64. Snell's Equity, 14-15.
(4) Loffus v. Maw, 3 Giff. 603.
(5) 1 Spence Eq. Jur. 421.

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a perpetual injunction against asserting it to the prejudice of a settlement.[1] So, if an heir at law should, by parol, promise his father to pay his sisters' proportion if he would not direct timber to be felled to raise them; although discharged at Law, he would in Equity be deemed liable to pay them in the same way as if they had been charged on the land.[2]

There are cases in which although statutes would be a bar at Law, Equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statute would not be a bar at Law, but where Equity notwithstanding, would refuse relief.[3] The maxim, though true in general, is like all other maxims in Equity involving general propositions, subject to changes and limitations wherever the justice of the particular case demands it.[4]

One author says: "Equity follows the Law wherever the Law can afford the entire remedy to which the complainant is justly entitled."[5] Indeed, if the Law is adequate, Equity has but to follow it, as none of its principles are then being surrendered. It is in this sense therefore that we understand the maxim, *Aequitas sequitur legem.* Equity follows, adopts, and is bound by the law so far as the principles of justice are expressed by the Legislature or the Common Law and are adequate in the particular set of circumstances. It is only when it is clear that the intent of the Law does not cover a certain case that Equity will refuse to follow it; and unless positively forbidden, it will take a case up at the point where the expressed Law leaves it and will proceed to administer such further justice as it demands. It thus supplies the defects, yet is not inconsistent with the Law or in opposition to it.[6]

We have now considered generally the reasons for and the scope of the maxim, *Aequitas sequitur legem,* and have seen in a general way that for the proper existence of a community of people, some power must exist which can enforce justice as near as possible between man and man; that such power in England was delegated originally to the Law courts and that in the nature of things such a code of Laws could not be adequate to give justice in every case, and hence has arisen an extraordinary jurisdiction resulting in a complete system of Equity Jurisprudence whose underlying principle is the same as that of the Law, that there must be a remedy for every injury, but operating on broader grounds and better able to carry the principle to completion. Also in partial solution of the task before us we have discovered that in the application of this principle, Equity will adopt and follow the Law or act upon its analogies where it is adequate to give a com-

(1) Prec. ch., 35, s. c. 2 Vernon R. 239.
(2) 1 Vent. R. 318.
(3) 2 Ves. Jr. 289, 2 Ves. Jr. 582. 1 Forb. Eq. 1, ch. 4, §27. 10 Ves. 466.
(4) 1 Story Eq. Jur., § 64.
(5) Snell's Eq., 14-15.
(6) 1 Story Eq. Jur., § 64.

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plete remedy; that it will refuse to follow the Law and will apply doctrines of its own wherever the Law is inadequate to give a complete remedy in a given case and thus work injustice on account of its generality.

In general, as to the jurisdiction of Equity, it may be said that Equity will follow the Law and refuse its extraordinary aid where first: a remedy at Law is plain; second, adequate; and third, complete. If the remedy is in any way obscure or doubtful, or if it falls short to the least extent so that the rights of the parties cannot be secured for the whole future as well as the present, then Equity attaches and gives a remedy according to its own rules, always, however, following the rules or analogies of the Law to such extent as is possible.

As we have stated, there are many cases in which a simple judgment for either party without qualifications or conditions would not do entire justice to either party. Some modifications of the rights of both parties may be required; some restraints on one side or on the other, or perhaps on both sides; some adjustments may be necessary, involving reciprocal obligations or duties; some compensation or preliminary proceedings to fix control or to equalize rights; some qualifications or conditions present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries. In all these cases Law courts cannot give the desired relief. They can entertain suits only on prescribed forms and they can give a general judgment only in the prescribed form. From their very character and organization they are incapable of the remedy which the mutual rights and relative situations of the parties, under the circumstances, positively require. "But the courts of Equity," as stated by Mr. Story, "are not so restrained; although they have prescribed forms of proceedings, the latter are flexible and may be suited to the different sets of circumstances. They may adjust their decrees so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain and model the remedy so as to suit it to mutual and adverse claims, controling the equities and the real rights of all the parties. Nay, more; they can bring before them all parties interested in the subject matter and adjust the rights of all however numerous, whereas courts of Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the suit."[1]

(1) Story Eq. Jur. § 27, 28, 29.

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Editorial.

We take pleasure in announcing that the editorial board of the Journal for the following year has been selected, and is constituted as follows: E. A. Feazel, '97, editor-in-chief; J. A. Chamberlain, 1902, business manager; associate editors, M. L. Thomsen, 1902; Julian W. Tyler, 1902; James E. Mathews, 1902; H. J. Webster, 1902; S. J. Deutsch, 1902; E. J. Hobday, 1902; H. C. Gould, 1902; Samuel E. Kramer, 1903; H. T. Duncan, 1903; and Benjamin B. Wickham, 1903. Messrs. Chamberlain, Thomsen and Tyler hold over from the present board and Mr. Chamberlain, who has been acting as assistant business manager during the current year, has received a merited promotion. The new board will not assume active control until after the end of the present collegiate year. The board was selected with the view of securing for the Journal not only capable men, but those who have manifested an interest in the paper and who will conscientiously work for its success; added to this, the promised assistance of several members of the Law School faculty in the Recent Case department and the general support which the Law School intends to give the Journal, the prospects for the next year are extremely bright.

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Comments.

Carriers—Duty to Person Assisting Passenger.—An interesting question as to the duty which a railroad company owes to a person who boards a train, not with the intention of becoming a passenger, but merely for the purpose of assisting a passenger and saying good-bye to the same, is discussed in Berry v. Louisville & Nashville Ry. Co., 60 S. W. (Ky.), 699. The plaintiff entered the train with his wife and children, although there was no necessity for it, as the porter had taken the various parcels, and as the train started, he said good-bye, and in alighting in the dark, fell under the car and was injured.

As no contract relation existed between the plaintiff and the railroad, he could not be considered a passenger, unless on account of the infirmity or age of the passenger it was necessary that he should render such assistance and the railroad authorities sanctioned and permitted the same. In such a case the implied contract of the railroad would be in effect, to carry said infirm passenger and to allow him to be placed upon the train by attendants and that the latter should have sufficient time to alight. Railroad Co. v. Crunk, 119 Ind., 542. Elliot on Railroads, Section 1578. In absence of any necessity of boarding the train, the plaintiff must be treated as a mere licensee and to whom the railroad merely owes the duty of ordinary care. Railway Co. v. McGilvary, 29 S. W., 68. The question then turns upon what is ordinary care in cases of this kind. Unless the railroad is notified that it is the intention of the plaintiff not to remain on the train, there is no obligation to delay the train and allow him time to alight. Griswold v. Railway Co., 64 Wis., 652. It may assume that he intends to become a passenger. After the train has started to move on, an attempt to get off is such negligence as will defeat a recovery for injuries sustained.

Constitutional Law—Vested Rights—Attachment.—At the time the chattel mortgages in question were made to the appellant, the laws of the Indian Territory required that they should be recorded in the county where the mortgagor resided. The mortgagor in this case was a non-resident of the Territory; the mortgages were recorded where the property was located, *i. e.*, in the Northern Judicial District of the Indian Territory. Subsequently the appellee, a judgment creditor, attached the mortgaged property and the appellant filed an interpleader. Over six months afterwards, while the suit was still pending, on February 3, 1897, Congress passed an act validating "all mortgages recorded in the judicial district where the property was situated at the time they were executed." The Circuit Court of Appeals held in Evans-Snider-Buel Co. v. McFadden, 105 Fed., 293, that this law was

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retroactive and made the mortgage lien superior to the attachment lien and that said act was valid and constitutional. To the objection that it impaired the obligation of the judgment and attachment, the court replied that that provision in Section 10 or Article 1 of the United States Constitution was merely a limitation upon the powers of the States and that the only question was, whether the appellee had been deprived of property without due process of law, within the meaning of the Fifth Amendment. The decision turned upon the point whether an attachment, in which there had been no adjudication, constituted a "vested right." It was held that it did not, at least as long as the attachment proceedings were pending and undetermined and that the appellees had no "property" right of which they could be deprived; that a writ of attachment was a mere statutory remedy which creates no contract rights and may be altered or abolished even after the action is instituted, provided an adequate remedy still remains. Sanborn, J., in a vigorous dissenting opinion, maintains that inasmuch as a judgment was rendered in the attachment proceedings three days before the act of Congress was passed, the lien was perfected and the appellees had thereby the right to apply the attached property to the payment of the judgment. "This," he says, "is a vested right of property, as sacred and valuable as it is possible to secure under the laws of our land." In the eyes of the law no difference exists between an attachment and a mortgage lien and both should be protected alike; a writ of attachment may be merely a remedy, but where it has been so applied, that specific property has been levied upon, the attaching creditor obtains a property right therein—which, to be sure, is inchoate at first and contingent until a judgment is rendered. It is submitted that the question of hardship and "morality" should not be urged to deprive a person of his constitutional rights and that the decision should be reversed.

Fraudulent Conveyance.—Action was brought under the Revised Statutes of Ohio, Sec. 6343 and 6344, to set aside a conveyance made to the defendant, as in fraud of creditors. The conveyance was made to secure an existing indebtedness and future indorsements. It was found to have been made for the purpose of placing the property beyond the reach of creditors at a time when the grantor was insolvent. The defendant took the conveyance in good faith and for the sole purpose of securing himself. Held: That the action did not lie; the proper remedy, if any, being under Sec. 5464, by Creditors bill, the conveyance amounting to an equitable mortgage.

Hegler et al. v. Grove, 59 N. E. (Ohio), 162.

Section 6343 provides that a conveyance in trust, when made during insolvency, to prefer one or more creditors, may be set aside by the other creditors; but this right is materially restricted by the judicial

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interpretation placed upon it. For there is a long line of cases in Ohio which hold that if the preference is made solely for the benefit of the one creditor, to whom the conveyance is made, then it does not come under the statute and no action can be maintained. If the creditor obtains the conveyance, "simply for the purpose of securing himself," and "deals with an eye single to himself," it is not considered a fraudulent conveyance. Atkinson v. Tomlinson, 1 O. S., 237. Justice v. Uhl, 10 O. S., 170; and Cross v. Carstens, 49 O. S., 548.

In 1898 these statutes were amended so that Section 6343 now reads: "Every sale, conveyance, * * whether made in trust or otherwise * * with a design to prefer one or more creditors to the exclusion, in whole or part, of the others, * * * or with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors." It is difficult to see how a creditor can secure himself during the insolvency of the debtor under the statute as it now stands, and it would seem that this case comes under its provisions, and had it arisen subsequent to 1898 might have been decided otherwise. As to whether a court can compel a creditor to surrender property which has been turned over to him to extinguish the debt owed to him is questionable and is yet to be decided in this State.

Recent Cases.

AGENCY—PARENT AND CHILD—NECESSARIES.—A parent is not liable for tutoring, which his son received during the summer vacation, on the theory that it was one of the necessaries of life.

Peacock v. Linton, 47 Atl. (R. I.) 887.

The court admits the necessity of a common school education and under certain circumstances a collegiate education as well, but holds that it is going too far to maintain that a boy should be under instruction throughout the whole year "without rest or recreation." The necessity is not so apparent that a tutor would be relieved of the ordinary duty of ascertaining the position and intentions of the person upon whom he seeks to fasten a contract obligation.

BANKRUPTCY—PROBABLE CLAIMS—RENT ACCRUING AFTER ADJUDICATION.—Petitioning creditor had leased a building to one Mahler for the term of five years and two months from March 1, 1896. Lessee entered into possession under the lease and remained therein until January 3, 1899, when, upon his own petition, he was adjudged a bankrupt. The bankrupt abandoned the premises on January 3, 1899, and has neither paid the rent which has accrued since that time nor made provision to restore the premises to their original condition. Petitioner claims rent for the remainder of the demised term and that accruing since the bankruptcy. Held: That rent accruing under a lease after the lessee has been adjudicated a bankrupt, is not provable against his estate under bankruptcy act 1898, either as a fixed liability or an unliquidated claim.

In re Mahler (D. C.), 105 Fed. Rep. 428.

As to resumption of possession by the lessor in this case the court also held, that where a lease of a store building authorized a re-entry by the lessor for nonpayment of rent, but contained no provision making the lessor agent for the lessee in respect to the premises, and after the bankruptcy of the lessee and the removal of his goods by his trustee, the lessor at once re-let the building temporarily, and subsequently for a term of years, his action amounted to an eviction of the bankrupt, which terminated the lease.

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BANKS—RECEIVING DEPOSIT WHEN INSOLVENT—RIGHT OF OWNER TO RECLAIM—ESTOPPEL.—Complainant was a depositor in a national bank, and on the day the bank closed its doors, and when it was known by its officers to be insolvent, he deposited a check. On the statement of the receiver that the proceeds of the check had gone into the general funds of the bank, he included the amount of the check in the proof of his claim in the insolvency proceedings, and received partial dividends on such claim. In fact, the check was collected by the bank examiner after the suspension, and the proceeds went into the hands of the receiver. Held: That the action of complainant in including the amount of the check in his claim under such circumstances did not amount to an election of a remedy, or create an equitable estoppel which precluded him, on learning the facts, from maintaining a suit against the receiver to recover the proceeds of the check as his property, on tendering back the dividends received thereon. A check deposited in a bank on the day it closed its doors, and when it was known by its officers to be insolvent, remains the property of the depositor who may recover the proceeds from the receiver, when they are shown to have come into his possession.

Richardson v. Olivier (C. C. A.), 105 Fed. Rep. 277.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS.—The act permitting the city of Detroit to amend its charter is contrary to the constitution, because it delegates a power which rests with the legislature of the state to the local authorities.

Elliott v. City of Detroit, 84 N. W. (Mich.) 820.

By this act the mayor, or any 5,000 electors, could frame and submit to the people of Detroit an amended charter, which they might either approve or reject. The objection is not to the referendum feature, but to the divesting the legislature of its right and duty to legislate or rather propose legislation.

CONSTITUTIONAL LAW—RIGHT TO ALTER AND AMEND FRANCHISES.—A franchise is granted a street railway, without referring to the question of exemptions from special assessments. Held: That a statute subsequently passed by the legislature, requiring the railway to pave the part of the street occupied by its tracks, is a reasonable exercise of the reserved power vested in the legislature, whether it be considered an exercise of the police power or the power of taxation.

Lincoln Railway v. City of Lincoln, 84 N. W. (Neb.) 802.

CRIMINAL LAW—DE FACTO OFFICERS.—Defendant was indicted under a statute of Texas for committing an assault upon an officer engaged in the discharge of his official duties. The officer in question had been duly appointed as deputy sheriff and had entered upon the discharge of his official duties, but without having taken his oath of office, or having filed his appointment for record as required by law. Held: That the appointee in question became a de facto officer and that the statute making it an offense to assault an officer applies as well to a *de facto* as to a *de jure* one.

Brown v. State, 60 S. W. (Tex.) 548.

EVIDENCE—PEDIGREE.—The plaintiff in an action for trespass, undertook to prove his title to the land in controversy. It was denied that certain grantors of the plaintiff were the sole heirs at law of their immediate predecessor, their father, and a deed dated A. D. 1817 reciting such to be the fact and signed by said heirs was held to be admissible and sufficient to establish that fact.

Young v. Shulenberg, 59 N. E. (N. Y.) 135.

This evidence is admissible as an exception to the hearsay rule on the ground that it pertains to pedigree. The deed being signed by the children, satisfied the requirement that the statement must be made by a member of the family and the elapse of 80 years was held to create a presumption of death. In Doe v. Michael, 17 Q. B. 276, Lord Campbell held that the presumption of the continuance of life gave way to the contrary presumption after a period of 50 years. Lord Mansfield, in Rowe v. Hasland, 1 Wm. Bl. 404, declared that "in establishing a title on a pedigree, it is sufficient to show that the person has not been heard of for many years, to put the opposite side upon proof that he still exists."

LIBEL—PRIVILEGE—PUBLIC CHARACTER.—An article was published over the defendant's name in a newspaper, which commented upon the reported

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action of the plaintiff, a Catholic priest, in taking up subscriptions for the Spaniards, but did not assert its truth. Held: That in absence of malice it was privileged..

Klos v. Zahorik, 84 N. W. (Ia.) 1046.

Clergymen are generally held to be public men, Kelly v. Tinling, L. R. 1 Q. B. 699, and as such may be the subject of severe criticism, without incurring liability for libel. However, the defendant would not be justified in making any false statements or promulgating the same. The case is different, where he merely criticises alleged acts of the plaintiff, based upon certain accounts which have appeared in the newspapers.

MASTER AND SERVANT—DISCHARGE—LOYALTY.—The plaintiff was employed as general manager of an insurance company under a ten years' agreement, to continue "during faithful performance of his duties." By deception he obtained proxies from the policy holders in order to defeat the incumbent administration, and for this he was discharged. The defendants thereupon were sued for breach of contract, and set up in defense the fraudulent conduct of the plaintiff. The trial judge rested the case upon the question of the plaintiff's motive and good faith; whether "he was actuated by a desire to improve the condition of the company, and not actuated by a desire to injure it in any way." This was held to be error.

Townsley v. Insurance Co., 67 N. Y. Supp. 664.

Motive is no doubt the criterion in ordinary cases where the conduct of third parties has been influenced to the prejudice of the plaintiff; but the present case is differentiated from those of malicious interference, by the contractual relation of master and servant. The appellate court, therefore, held that the motive was here immaterial. "The plaintiff assumed under this contract the obligation to act in good faith toward his employers, and it would be a violation of his undertaking for him to deliberately and intentionally deceive them in any material matter. His good faith as to whether a change would or would not be to the advantage of the company was not the question." Such a violation of his duty justified his discharge.

NEGLIGENCE—IMPUTATION TO HIRER OF CONVEYANCE.—Action for wrongfully causing the death of plaintiff's intestate, who. with a livery outfit and driver, attempted to cross defendant's track in front of an approaching train. Both hirer and driver were intoxicated and defendant gave no signal. Held: That plaintiff's intestate was guilty of contributory negligence, on the ground that the driver having control of the horses did not excuse his failure to exercise common prudence.

Illinois Central R. Co. v. McLeod, et al., 29 So. (Miss., Jan. 1901), Rep. 76.

It seems that in this class of cases there is much conflict among the authoritites, yet the correct principle would seem to be that where the injured person is riding as a guest or companion, contributory negligence of the driver is not imputable to the injured party; but that when he is in a position to exercise authority or control over the driver, and fails, he cannot recover. The one to whom the negligence is imputed must stand in such a relation of privity to the negligent party that "*qui facit per alium, facit per se*" directly applies.

NEGLIGENCE—RAILROADS.—Plaintiff was injured while passing between two coupled freight cars—a part of a train which stood across a foot-path in defendant's switch-yard. Before swinging himself up upon the drawheads, he twice looked and listened, but saw no engine. Held: That plaintiff was guilty of contributory negligence, and cannot recover.

Murdock v. Yazoo, etc., R. Co., 77 Miss. 487 (29 So. Rep. 25).

That the verdict should be for the defendant, there is no doubt, but in view of the facts stated, basing the decision on contributory negligence is clearly wrong. Even though the plaintiff was upon the foot-path as a licensee, the defendants were guilty of no negligence, and it is well known that there can be no contributory negligence on the part of the plaintiff except in cases where there has been negligence upon the part of the defendant. Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury. In this case it is difficult to see, from the facts stated, how there was any negligence on the part of the railroad at all. Cer-

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tainly, with an unbroken train of cars across the path, there was no implied invitation to pass over.

NEGLIGENCE—STREET RAILWAYS—PASSENGER ON RUNNING BOARD.—A person is not guilty of contributory negligence or assumption of risk who stands on the running board of an open car, when, on account of the crowded condition, he is unable to get inside of the car, or even onto the platform. The conductor in allowing him to remain there obligates the company to exercise reasonable precautions for his protection, and in case he is injured by the hub of the wheel of an ice wagon through the negligence of the motorman, the company is liable.

Bumbear v. United Traction Co., 47 Atl. (Pa.) 961.

In case of steam railroads, the passenger must go inside. Railroad Co. v. Hoosey, 99 Pa. St. 492. In case of horse cars it is not *per se* negligence to stand on the platform, Mann v. Traction Co., 175 Pa. St. 339, but it has been held to be so on a trolley car, when there was no good reason why the passenger should not have gone inside. Thane v. Traction Co., 191 Pa. St. 249.

RELEASE—MISTAKE.—Plaintiff, who had sustained injuries in a railroad accident, executed a release of all claims growing out of the injuries. At the time of the release the only injury apparent was to his ankle. Subsequently it was discovered that the injury extended to his spine and bowels. Action to set aside the release except so far as it applied to the injuries to his ankle, on ground of mistake. Held: That the release embraced all damages resulting and that it cannot be varied by parol evidence to show that only the injury to the ankle were in the contemplation of the parties.

Houston, etc., Ry. v. McCarty, 60 S. W. (Tex.) 428.

The contract is in legal effect a waiver of all inquiry into the fact of the extent of the injury, and the consideration received for it is generally understood to cover the uncertainty of the injury and the chance of its being greater or less. Kowalke v. Milwaukee, etc., Co., 103 Wis. 472.

REMOVAL OF CAUSES—JOINDER OF DEFENDANTS.—Plaintiff had brought an action, as administrator, for the wrongful death of his intestate. He joined the defendants as master and servant, on their joint liability. Defendant railroad company petitioned for a removal from the state court into the federal court, and asked for a separation of defendants therefor. In doing so it attacked the motives of plaintiff in joining the defendants, claiming that it was done simply to prevent a removal of said cause. Held: That one of two defendants sued jointly in a state court was joined for the purpose of preventing a removal of the cause to the federal court by the other defendant, does not give the latter the right of removal, where the plaintiff had the legal right to bring a joint action. It being the settled rule in Indiana that a master and servant may be jointly sued for an injury resulting from servant's negligence, such an action brought in a court of that state cannot be severed for the purpose of removal.

Charman v. Lake Erie & Western Railroad Co., et al. (C. C.) 105 Fed. Rep. 449.

As to the materiality of the motive in bringing the joint action the court said: "The statement that the defendant Oliver was joined as a co-defendant with the petitioner for the purpose of preventing a removal is of no importance. If the plaintiff had the right to bring a joint action against the company and its servant for the negligent killing of the plaintiff's intestate, his motive or purpose in so doing is immaterial." This decision follows the recent case of Chesapeake & Ohio Ry. Co. v. Dixon, 21 Sup. Ct. 67, which establishes the rule in the Federal Courts as to the removal of causes on the ground of diversity of citizenship. Cf. VII Western Reserve Law Journal, page 30.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF A PATENT.—Action by vendor to compel specific performance of an agreement by vendee to purchase a patent. Bill dismissed.

Anderson v. Olsen, 59 N. E. (Ill.) 239.

It is well settled that a court of equity will not compel the specific performance of an agreement to pay money, for the reason that the law furnishes an adequate remedy. 22 Amer. Eng. Ency., 997. The vendor invoked in his behalf the doctrine of mutuality, claiming that as the vendee of a patent may have specific performance of the contract, the vendor should have the same

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remedy. The court referred to Lancaster v. Roberts, 144 Ill. 213, and Welty v. Jacobs, 171 Ill. 624, where the doctrine of mutuality had been recognized, but said that in the face of the long line of decisions holding that specific performance will be refused where there is an adequate remedy at law, it was not disposed to grant the relief prayed for, since the plaintiff had such adequate remedy at law.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF STOCK.—This was a suit in equity to compel the specific performance of a contract to sell stock in a railroad corporation. Held: That a court of equity may decree the specific performance of a contract for the sale of stock in a corporation, where such stock cannot be purchased in the market and has no market value.

Newton v. Wooley, et al. (C. C.) 105 Fed. Rep. 541.

As to the jurisdiction of a court of equity in decreeing specific performance in such cases, the court said: "It is insisted that a court of equity has no jurisdiction to decree the specific performance of a contract for the sale or delivery of corporate stocks, but that the remedy is exclusively at law in an action for damages sustained by reason of the breach of the contract. While it is true that, as a rule, the remedy for failure to deliver stock is at law for damages, there are exceptions to this rule. One of the exceptions is where the value of the stock is not easily ascertainable, or the stock is not obtainable on the market at all. In such case a court of equity may decree specific performance."

TRADE-NAME—"QUEEN QUALITY"—Held that the trade-name of "Queen Quality" as applied to a certain kind of shoes, is entitled to protection against competition, which endeavors to obtain the advantage of the reputation which the shoes have gained under that name.

Plant v. May Co., 105 Fed. 375.

It was urged that the name "Queen" was merely descriptive; in rejecting this contention the court followed a line of cases, in which similar names were protected, as "Kaiser," "Monarch" and "Royal." Brewing Co. v. Kaiserbrauerei Co., 74 Fed. 222. Raymond v. Baking Powder Co., 85 Fed. 231. The test as laid down in Mill Co. v. Alcorn, 100 Fed. 72, is that the name should tend to identify the ownership or origin of the article, but in case it is used for the purpose of indicating "the class, grade, style, or quality of the goods, it cannot be sustained."

Pamphlet Received.

The Negotiable Instruments Law. A Reply to the Criticisms of Professor James Barr Ames. John Lawrence Farrel of the New York Bar. Reprinted from the "Brief" of Phi Delta Phi.

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THE

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Proceedings in Error.

II.—IN OHIO BEFORE THE CODE.

F. B. WILLIAMS.

In dealing with the Ohio practice relating to proceedings in error prior to the adoption of the present code procedure, it will be convenient to discuss first the distinction between writs of error to correct errors of fact and those to correct errors of law. The former, it will be remembered,[1] were, according to the common law practice in England, styled writs either *coram nobis* or *coram vobis*, according as the review was held in the King's Bench, and so *coram rege* by fiction of law, or in the Common Pleas or other court of record where the king was not supposed to preside. But in every case they were to correct errors of fact only, and were tried by jury in the same court where the error was committed. It is needless to remark that there has never been anything in our American judicial organization, Colonial or State, reproducing or in any way resembling the above pre-eminence of the King's Bench as a court held by the sovereign in person. The most sensible practice, then, would seem to have been to drop entirely the use of one of the terms *coram nobis* and *coram vobis*, and to retain the other to describe all writs of error to correct errors of fact. And in view of the circumstance that application for such writs is always made to the same court which committed the error, and that the trial of the question whether such error has been committed is held before that court, it would seem clearly preferable to retain in use the style *coram nobis* only. As to the older Ohio practice, the writer has been unable to find anything earlier than the year 1833. In that year appeared the first Ohio book of practice, Wilcox's Forms, wherein the statement is made that the writ *coram nobis* was not used in Ohio; that all errors were reviewed in the Supreme Court by writ *coram vobis*, and that this lay to correct errors of fact as well as law.[2] This confusion ought to receive every extenuation in view of the natural difficulties in the path

(1) This article is a continuation of one in the preceding issue on proceedings in error at common law.
(2) Wilcox's Forms, 1st ed., 1833, p. 206.

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of accurate legal learning then prevalent in a new and thinly settled country, and also in view of the excellent quality of most of the material in Mr. Wilcox's book. In his statement also that error of fact might be reviewed in a higher court, he was supported by an early New York case,[1] which had only made the subject more mysterious to pioneer lawyers. In the next year following Mr. Wilcox's statement, and perhaps in consequence of it, the Supreme Court of Ohio was called on to pass on the question. Application was made to the Supreme Court sitting for Ashtabula County for a writ of error *coram nobis resident* on the ground that a previous judgment in the same court had been rendered after the death of one of the plaintiffs. The case presented a novel question and was reserved for the Court in Banc at Columbus, where it was finally held that the writ should be allowed.[2] "No practice on the question (i. e. within the State) is known to us," said Judge Wright, "this being the first application within our knowledge, though tradition advises us that the writ has, in times past been both allowed and refused." This settled the matter for errors of fact committed by the Supreme Court, as subsequent adjudication shows.[3] But as the statutes of that time denied the writ of error to any but the Supreme Court,[4] one is left to conjecture the practice in the lower courts, probably informal and not uniform. By an act of March 12, 1845,[5] however, ample provision was made for the correction of errors of fact by the trial court, whether Common Pleas or Supreme. Thereafter the practice was substantially that of the English common law, until the code abolished all writs of error and substituted a somewhat simpler procedure, by motion or petition according to the kind of error of fact alleged.[6]

In what follows especial attention will now be paid to the writ of error simply so-called, that is, for the correction of errors of law, although occasionally what is said may be seen to apply to all writs of error. The practice of this State has not been constant as to whether such writs should be granted, as, of course, *ex debito justitiae*, or only on good cause shown, at least in civil cases. In criminal cases there has been little, if any, variation from the requirement that good cause be shown, substantially as in England.[7] But in civil cases the Ohio law has varied. Under the territorial government the writ issued as a matter of right. This would follow from the Ordinance of 1787, which guaranteed forever "proceedings according to the course of the com-

(1) Arnold v. Sandford, 14 Johns. 417, (1817).
(2) Dows et al. v. Harper et al., 6 O. 518, (1834).
(3) Cisna's Adm'r. v. Beach, 15 O. 300, (1846).
(4) Act of March 8, 1831, Chase III, c. 822, p. 1673.
(5) 43 O. L. 79, § 5; Curwen II, c. 585, p. 1139.
(6) Other American states have not escaped confusion of the terms coram nobis and coram vobis, as may be seen from 5 Enc. Pl. and Pr., 26 et sequ.
(7) The writer has been unable to find anything earlier than the Act. of Feb. 16, 1810, Chase I, c. 243, p. 705. See also the act of Jan. 28, 1829, Chase III, c. 771, p. 1618; and the act of March 7, 1831, Chase III, c. 833, p. 1730. For the English law, see preceding issue of this journal.

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mon law,"[1] but in addition it was expressly provided by an act adopted in 1795 that "anyone complaining of error on the part of the quarter sessions, or of any other courts of record, might have a writ of error, as of course returnable to the general court."[2] Under the State government also the writ remained obtainable as of right for a few years,[3] but an act of January 27, 1806,[4] changed that and required good cause to be shown. This remained the law for nearly forty years,[5] so during the greater portion of the life of the old Supreme Court.

What the practice was in detail may be seen very clearly from the pages of Wilcox.[6] The applicant for the writ first procured from the clerk of Common Pleas[7] a transcript of the record complained of, prepared an assignment of errors, and presented both to a judge of the Supreme Court in vacation, or to the Court in term time, for allowance of the writ. The allowance, generally made by a single judge even in term time, was indorsed upon the transcript thus: "Let a writ of error be issued, returnable at next term. A. B., Judge." The transcript thus indorsed was then filed with the clerk of the Supreme Court, who thereupon issued the writ of error. It ran, of course, like all writs, in the name of the State of Ohio, and was directed "To the Judges of the Court of Common Pleas." Reciting the complaint of error, and expressing its willingness to correct it, if there be any, the State commands the return of a transcript with the writ. In theory the writ should next be served on the Court of Common Pleas, a new transcript made and attached to the writ, and return of both made to the Supreme Court with the authentication of the clerk below. But the expense, delay, and needlessness of all this ceremony, except as a formal compliance with the law, led to the growth of a practice which was, to say the least, irregular, though doubtless, as Mr. Wilcox observes, "very convenient." Under the 11th rule of the Supreme Court (Dec. Term, 1823, 5 Ohio Rep. 6) there grew up the practice of attaching the first transcript, used at the appli-

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(1) Ordinance of 1787, Art. II; Chase I, p. 68. This "article of compact," like the others in Articles II and following, was alterable "by common consent" only, and was not altered until the constitution of 1802 was adopted.

(2) Act of Aug. 15, 1795, adopted from Pennsylvania, Chase I, c. 44, § 8, pp. 148-9. The legislation of 1795 constituted the first serious attempt to provide a tolerably complete body of statutory law for the territory. These are the laws known, from their publisher, as the "Maxwell Code."

(3) See act of Apr. 15, 1803, Chase I, c. 7, p. 355; Feb. 18, 1804, Chase I, c. 44, § 3, p. 412; Feb. 22, 1805, Chase I, c. 55, p. 450.

(4) Chase I, c. 125, § 11, p. 531.

(5) Until the act of Mar. 12, 1845, to be spoken of later in the text, which abolished appeals from judgments at law and encouraged proceedings in error by allowing them as of course.

(6) Wilcox's Forms, p. 207 et sequ.

(7) Under the constitution of 1802 it will be recalled that there was no court intermediate between the Common Pleas and the Supreme Court; the only courts of record (aside from the Superior courts in Cleveland and Cincinnati) were the Common Pleas and Supreme court. The latter went on circuit to each county in the state, and also held a special session once a year in Columbus to decide questions reserved on circuit. Wilcox's Forms, pp. 1-4. The Supreme court alone could review errors of law.

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cation for the writ, to the writ, and filing both with the clerk of the Supreme Court without any service on, or return from the court below. "This," says Mr. Wilcox, "may now (1833) be considered the settled practice of the Supreme Court."[1] In theory there should also be a new assignment of errors on the new transcript, but here again the informal practice permitted the old assignment to be filed. Thus early did the profession in this State become accustomed to regard the writ of error as a needless formality. Application had, indeed, to be made for it, but once obtained it was not used. The law relating to its service and return was ignored, a dead letter, for some twenty years. All this resulted from the requirement of a transcript and assignment on application for the writ, and the consequent needlessness of duplicating these papers after the writ was obtained. By the Act of March 12, 1845, return was made to the original practice in England and this State by providing that the writ of error in civil cases should issue as of right, without leave of court, on the mere filing of a precipe.[2] It would seem that actual service was made of this writ, and actual return made of the necessary papers.[3] But the profession had been too long familiarized with the irregular practice preceding this last statute to feel the need of the writ, and the way was well prepared for its abolition in the code.

Once the record was lodged in the Supreme Court, the subsequent proceedings followed the course of the common law, as described in an earlier paper, in substantially every particular. The assignment of errors was almost identical with our present petition in error.[4] The process was called a citation, and had to be served and notice of the allowance of the writ given at least ten days before the term at which the writ was returnable.[5] The Ohio statutes always required a bond, not as a condition precedent to obtaining the writ of error, but as a *supersedeas*.[6] Up to the time of Mr. Wilcox's book, at least, the practice does not seem to have been uniform in requiring the writ of *supersedeas* to be actually issued, but thereafter it appears to have become customary to have it issued, usually embraced in the same writ with the citation and notice. The pleadings subsequent to the assignment were all as at common law, with a slight alteration made in 1850 with a view to accelerate error proceedings. By the Act of March 21, 1850, it was provided that the defendant in error pleading *in nullo est erratum* might at the same time plead in abatement or in bar; but that the issue on the first plea should be determined first.[7] Upon suggestion of diminution or mistake in the record, the writ of certiorari does not in practice appear to have issued frequently. Instead the clerk of Com-

(1) Wilcox's Forms, p. 209, note a.
(2) 43 O. L. 80; Curwen II, c. 586, § 6, p. 1139.
(3) Curwen II, p. 1141, note 1.
(4) For a form, see Wilcox, p. 210.
(5) Ibid., p. 211.
(6) Curwen II, p. 1141, note 2.
(7) 48 O. L. 25; Curwen II, c. 966, § 1, p. 1515.

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mon Pleas was, by consent of the parties, permitted to amend the original transcript upon such terms as would work no injustice.[1]

Such was the practice in error in Ohio prior to March 11, 1853.[2] Few deviations from the course of the English common law are to be remarked. Aside from the obvious deviations required by the difference in political institutions, the peculiarities of Ohio practice connect themselves with the requirement, during the greater part of the period covered here, that leave of court be obtained before the writ issue. The irregular practices which followed and became settled in this State furnished the suggestion for, and the foundation of, the main reforms made in this branch of procedure by the Civil Code.

The propriety of requiring leave of court for the commencement of error proceedings depends, of course, on the desirability, under given conditions, of discouraging error proceedings, either generally or in particular classes of cases where delay is more than usually productive of injury. Of these latter special cases no discussion can with propriety be made here. Of error proceedings generally one cannot fail to observe that, during the greater part of this period of our legal history, they were not favored by the court, and apparently not wanted by litigants. This is doubtless due to the practice, first sanctioned by a territorial statute of 1800,[3] and continued until 1845,[4] of allowing an appeal from all judgments at law as well as decrees in Chancery.[5] Experience shows that when a suitor has the option of appealing his case and trying it all over again, and before another jury, if he desires one, he will rarely go up on error. His chances of success are usually considered greater on appeal, if for no other reason than that a case tried the second time may usually be tried with better preparation. Anyone who will glance through the Journals of the old Supreme Court for his county—and their number will be found small[6]—will find that by far the greater number of the law cases brought up from the Common Pleas came up on appeal. For such a practice in the abstract, viewed without regard to peculiar conditions of time and place, there seems to be nothing good to be said. To permit an appeal of a law case as of course is simply to allow a new jury trial as a matter of right in every case. It cannot be defended by saying that a better judge and jury may thus be obtained, for the obvious remedy is to provide such courts in the first instance or abolish them. The practice can only be defended where the inferior courts are of necessity comparatively rude and primitive, and the parties either not represented by counsel at all, or not

(1) Wilcox, p. 220, note a.
(2) Errors in justices' courts were reviewed in the Common Pleas on certiorari during all of this period; never on writ of error.
(3) Act of Dec. 9, 1800, Chase I, c. 141, p. 306.
(4) Act of Mar. 12, 1845; 43 O. L. 79; Curwen II, c. 585, p. 1139.
(5) The territorial courts had no chancery jurisdiction. McArthur v. Porter, 1 Oh. 99, 101.
(6) In Cuyahoga county five volumes, two quite small, cover the period from the organization of the county in 1810 until the establishment of the present Supreme court.

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adequately represented. Under such circumstances there is much to be said against requiring the parties to stake their case, when carried up, on the incompetency of the attorney in saving exception on the one hand, and that of the trial judge in his rulings on the other. Errors may better be corrected in a rough way by appeal. Doubtless considerations of this nature induced the adoption of this practice in the wilderness of 1800, and justified its retention for some years. Mr. Wilcox has nothing to say against it, but not long after his first edition mutterings began to be heard, and in the decade of the 40's criticism becomes savage. Under changed conditions the law appeals become absurd, expensive, and, above all, productive of unconscionable delay.[1] At length in 1845 a late attempt to remedy the evil was made. All appeals from the Common Pleas in law cases were abolished, and instead parties were henceforth required to go up on error, if at all.[2] Now it was that the writ of error was made to issue as of course,[3] as it had in the earlier days of the Territory and State. But the remedy came too late to do much good. Too many other evils had accumulated in the meantime for any one reform to help greatly. The age was active for law reform, following the remarkable movement started in New York, and a general reorganization of the Constitution, the judiciary, criminal law and criminal and civil procedure was resolved upon. That these plans were carried out with signal success time has amply demonstrated. What these sweeping changes did for proceedings in error will be considered in a future article.

(1) The earlier volumes of The Western Law Journal contain many such complaints —too numerous for citation here.
(2) Act of Mar. 12, 1845; 43 O. L. 79; Curwen II, c. 585, §2, p. 1139.
(3) Ibid., §6.

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Impossible Contracts.

A. G. CARPENTER.

An impossible contract is one which, by reason of its performance being impossible in itself, or by law, or by the happening of an event not contemplated within the terms of the contract, cannot be enforced. "An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditioned on the performance of it being or continuing possible in fact."[1] The subject is susceptible of the following divisions:

I. Contracts impossible of performance at the time when made.

II. Contracts impossible of performance by reason of the happening of some future event.

Contracts impossible under the first division are so either by reason (a) of their performance being impossible within themselves, or (b) they may be impossible by law.

If they are impossible within themselves it is because they either involve a contradiction or are contrary to the course of nature—and are said to be void because the impossible nature of the contract itself shows there was no real intention of contracting and therefore no real agreement—or that it was so absurd that the parties cannot be supposed to have so contracted. In other words, so absolutely impossible that reasonable men in the position of the parties must treat it as impossible. For example, binding another to sell and convey you a piece of land already your own. To make a river run up hill, or to agree to go from the Church of St. Peter in Westminster to the Church of St. Peter in Rome in three hours.

However, difficulty, inconvenience or impracticability arising out of circumstances merely relating to the promisor will not excuse him. It is only when the impossibility resides in the nature of the action in itself and not in the particular circumstances of the promisor that the law will excuse one. As said by Willis, Judge, in Clifford vs. Watts, Law Reports 5 Common Pleas, 577, "I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance and cannot set up by way of defense that the thing was impossible."

Contracts impossible by law are manifestly void. A promise to

(1) Pollock on Contracts, Sec. 352.

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marry by one who is already married and known so to be by the other, is a void promise.[1] If such fact is not known to the other he is liable in damages.[2]

This case also illustrates the principle that where the impossibility of performance was known to the promisor but not to the promisee the promisor is nevertheless bound.

Contracts under the second general division given above will be impossible of performance:

First. Where a change has arisen in the law of our own country.

Second. Where by the language itself, or by legal interpretation, the event causing the impossibility is not within the terms of the contract.

Third. Where the performance depends upon the continued existence of a specific thing.

The case of Bailey vs. DeCrespigney, L. R. 4 Queens Bench, 180, is the leading case illustrative of the first of the foregoing subdivisions. In that case a lessor covenanted with the lessee that "neither he nor his heirs nor his assigns would allow any building (with certain small exceptions) on a piece of land of the lessor fronting the demised premises. Afterwards the Railway Company purchased this piece of land under the compulsory powers of an Act of Parliament and built a station upon it. The lessee sued the lessor upon his covenant, but the Court held that he was discharged by the subsequent Act of Parliament, which put it out of his power to perform it. The claim was made that the defendant having covenanted that his assigns should not build, he should therefore be held liable. But the Court held that the defendant when he contracted, used the general word Assigns, knowing that it had a definite meaning, and he was able to fully see and guard against the liabilities which might arise from his contract so interpreted. The Legislature by compelling him to part with his land to the Railway Company, whom he could not bind by any stipulation as he could an assign chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee, is to make an entirely new contract for the parties. On the other hand, to confine the word "Assigns" to those who take by the voluntary act of the assignor, would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee; because all those who take from the first assignee, do so in consequence of the original voluntary act of the assignor, and it is his own fault that he assigned that at all, or that he did not in the original conveyance guard against acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be col-

(1) Paddock v. Robinson, 63 Ill. 99.
(2) Kelley v. Riley, 106 Mass. 339.

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lected from their words, interpreted according to their known ordinary signification."

The decision in the case of State of New York vs. Globe Mut. Life Ins. Co. 91, N. Y. 174 is founded upon the same general doctrine. The Ins. Co. employed one Mix general agent on a specified salary for a term of not less than five years. Mix continued in the discharge of his duties for more than two years, when a receiver of the corporation was appointed in a suit instituted by the Attorney General of the State, and the corporation was dissolved by order of the Court, thereby preventing the Ins. Co. from performing its part of the contract. The Court, Finch J., say "there was no breach of the contract between Mix and the Ins. Co. by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service, the Co. had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For ought that appears, it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the Co. and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the Co. could not refuse and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. He could do neither. Performance by him had become illegal. It would have been a criminal contempt and possibly a misdemeanor. There could be neither readiness nor ability to do forbidden and unlawful acts. So that from the necessity of the case, as there was no breach by either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement."

But where the performance of a contract has become impossible by reason of its being forbidden by a foreign law, it is deemed to have become impossible not in law but in fact. "The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities."[1]

In regard to the second subdivision, questions of much greater

(1) Taylor v. Taintor, 16 Wall, 366.

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difficulty frequently arise. By the terms of the contract did the parties have in contemplation the happening of the event? What in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is well stated in 2 Chitty on Contracts, 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossibility when he might have provided against it by his contract. And, therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by, or within the control of the party."[1]

"If a man bind himself, by a positive express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors, but in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability. The law does no more than enforce the contract as the parties thereunder have made it."[2] "If a person promise absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and the thing to be done, or the event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance before that time becomes unlawful."[3]

Much difficulty and confusion are experienced in determining liability from the happening of events commonly known as "Acts of God." But as said by Hannen, Judge, in Bailey vs. DeCrespigney, "This is in fact an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract, for as is observed by Maul, Judge, in Canhan vs. Barry, 15 C. B. 619, 'A man might by apt words bind himself that it shall rain tomorrow or that he will pay damages.'"

But how shall we determine finally in this class of cases whether the act or event complained of is within or without the contract. If

(1) Anderson v. May, 50 Minn. 280.
(2) Stees v. Leonard, 20 Minn. 494.
(3) School District v. Danchy, 25 Conn. 530.

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within, by the foregoing rules performance must be made or damages will follow. The following is the rule adopted by the English and the U. S. Supreme Courts: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

"But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." In other words, can the event reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made.[1]

The third subdivision, viz: where the performance depends upon the continued existence of a specific thing, is fully illustrated in the case of Taylor vs. Caldwell, 3 B. & S. 824. In this case the defendants agreed to let the plaintiffs have the use of the Surrey Gardens and Music Hall on certain days for the purpose of giving entertainments. Before the first of those days the Music Hall was destroyed by fire, so that the entertainments could not be given, and without the fault of either party: The Court held that the defendants were excused, and laid down the following principle:

"Where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty, that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible, from the perishing of the thing without fault of the contractor." Blackburn, J., in his opinion says: "There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs, men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."

In the civil law such an exception is implied in every obligation of

(1) Bailey v. DeCrespigney, 4 Q. B. 180.
Chicago, Milwaukee & C. Ry. v. Hoyt, 149 U. S. Rept. 1-14.

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the class which they call "*obligatio de certo corpore.*" The principle seems to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing, shall excuse the performance.

Following the doctrine as laid down in Taylor and Caldwell, we have the case of Howell vs. Copeland, L. R. I. Queen's Bench Div. 258, where the defendant agreed to sell plaintiff 200 tons of regent potatoes grown on land belonging to defendant in Whaplode, at a certain price, and deliver the same during the months of September and October of that year. Defendant made every effort on his part to grow the potatoes, but they were attacked by a disease, which no care or skill on his part could have prevented, and caused the crop to fail. The Court, Lord Coleridge, C. J., say, "It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes of a particular kind, grown on a specific place if deliverable from that place. On the facts, the condition did arise, and the performance was excused." Anderson vs. May, 50 Minn. 280, was decided upon the same doctrine.

In Turner vs. Goldsmith, 1 Queen's Bench, 544, Goldsmith employed Turner to act as his traveling agent for the period of five years at a fixed salary, to sell the various goods manufactured or sold by defendant. The defendant's place of business was burnt down, he gave up the business and made no effort to resume it. The plaintiff claimed damages for breach of agreement to employ him for the entire five years. The Court say, "On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How then, can such a condition as the defendant contends for be implied?"

In Butterfield vs. Byron, 153 Mass. 517, the defendant agreed to build for the plaintiff a hotel, for a certain amount. The plaintiff was to do the grading, stone and brick-work, plumbing and painting; after the building was partially completed, it was struck by lightning and burned to the ground. The plaintiff never made any demand upon the defendant to rebuild, nor offered to lay the necessary foundations for a new building, neither did the defendant call upon the plaintiff to lay such foundations, nor offer to rebuild. The Court say: "If the plaintiff was not obliged to make his contribution of work and materials towards the building of a second house, neither was the defendant. The agreement of each to complete the performance of the contract after a building, the product of their joint contributions, had been partly erected, was an implied condition that the building "*should continue in existence.*"

To the same effect are the cases of Spalding vs. Rose, 71 N. Y. 40.

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State of N. Y. vs. Globe Mut. Life Ins. Co., 91 N. Y. 174. Lacy vs. Eetman, 119 N. Y. 109. Lakeman vs. Pollard, 43 Me. 463. Dewey vs. Union School Dist., 43 Mich. 480.

Strange as it may seem we have but one reported case upon this subject in Ohio. Not one of the leading cases is cited in any of the Judges' opinions, so far as we can find. The reported case to which we refer is that of Board of Education vs. Townsend, decided Dec. 18, 1900, 45 Weekly Law Bul. 86. Townsend for the R. R. Co. had exchanged lots with the plaintiff and had agreed "to remove thereto and reconstruct and rebuild thereon the school house, so that it will be in a proper and suitable condition for school purposes." Before removing, the school house was blown and demolished by a violent wind storm, so that it could not, as a school house, be removed. Williams, J., in deciding the case says: "The essential purpose which the parties had in mind was, that there should be placed by the defendant, without expense to the Board of Education, the same facilities in the way of buildings for carrying on the public school there, that existed at the time of the contract on the lot then owned and in use by the Board, * * * * * And in so far as the defendant had failed to do those things, he has received from the Board a valuable consideration which he retains, and for which he has not given what he promised, nor anything whatever." Judge Davis, in a dissenting opinion, seems to rely entirely upon the doctrine of Taylor vs. Caldwell, but construes the contract as it seems to us too narrowly and in a manner not warranted by the principles laid down in the leading cases upon this subject.

We have endeavored in this article to give an abstract of some of the leading cases upon this subject, for the purpose of making clear the leading fundamental principles applicable in the solution of what is known in the law as impossible contracts. It is a subject not free from difficulty, and of great importance to the practicing lawyer. If one will keep in mind steadily what the parties must reasonably be supposed to have had in contemplation with regard to the happening of the event which causes the impossibility at the time of making their contract, if he will remember that an Act of God, which will excuse performance, is always an event not within the contract, i. e. an event which the parties could not reasonably be supposed to have had in contemplation—such as death or destruction, when the contract was conditioned upon its continued existence,—he may feel sure he has the essential key that will unlock at least the outer door to the hidden chamber. He must then bear in mind, 1st, that a foolish or absurd contract will not be enforced; 2nd, that a contract which cannot be performed without violating the law as it was when the contract was made, or when required to be performed is void; 3rd, that the future

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event which will excuse performance must be such a one as is expressly excepted or that cannot reasonably be supposed to have been within the contemplation of the parties at the time of making the contract; 4th, or was conditioned upon the continued existence of some specific thing.

Equality and Uniformity of Taxation.

C. W. SWARTZEL.

In passing upon the constitutional validity of recent tax laws, the Courts, both Federal and State, have been called upon to construe provisions which require, it is distinctly claimed, that "taxes shall be equal and uniform." The meaning of this so-called maxim of equality and uniformity of taxation, and its status as a constitutional question, form the subject of this inquiry. After reference to its meaning, the cases bearing upon the subject in relation to (1) the Federal Constitution, (2) the State Constitutions and (3) Constitution of Ohio, will be considered.

Considered as a canon of public finance, one school of writers say: "Equality of taxation, as a maxim of taxation, means equality of sacrifice." That is to say,[1] the tax should impose an equal *sacrifice* upon every citizen. Other writers hold that equal taxation means imposition according to one's *ability*.[2] A third class of writers say that equal taxation requires apportionment according to the *benefit* each citizen receives from the governmental protection and service.[3] The first two theories seem to present only the positive and negative of the same idea. In these three, as indeed, in all theories of just taxation, inherent and almost insuperable difficulties confront the fiscal officer and the legislator in determining what constitutes equal sacrifice or equal ability. Is sacrifice proportional to wealth or does it decrease as wealth increases? What shall be the measure, i. e. the basis upon which to decide how much each citizen should pay? From these and many similar questions it appears that, regarded from an economic and legislative standpoint, equality and uniformity of taxation present problems as to which the ablest men will differ. From its very nature, therefore, a wide discretion must be allowed the law-making branch in its exercise of the taxing power.

Considered from the standpoint of legal theory, however, a somewhat more definite result may perhaps be reached. In stating what, as a legal question, constitutes just taxation in the United States, Judge Cooley says that "what is aimed at is, not strictly just, but such taxes as will best subserve the general welfare of political society."[4] This

(1) Mill, Pol. Econ., b. 5, ch. 2, sec. 2.
(2) Seligman's Essays on Taxation.
(3) Cooley, Taxation, p. 16.
(4) Taxation, p. 17.

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shows that equality of taxation is, at best, only an approximation. Added to the universal difficulties in tax problems, the division of the taxing power in the United States so that its exercise is concurrent in the hands of different authorities, renders the proper co-ordination of all taxes doubly difficult.[1] Yet the main inquiry remains, what do American constitutions require with reference to equality and uniformity? What restrictions on the power to tax do their provisions prescribe in respect to equality and uniformity beyond the limitations imposed on legislative power in general?

1. The Federal Constitution, Art. 1, sec. 8, declares that "all duties, imposts, and excises shall be uniform throughout the United States." In the Head Money Cases[2] the meaning of this section was drawn into question. The tax was imposed upon steam vessel owners for each passenger landed at New York from a foreign port. The objection, that the rule of uniformity was violated, was disposed of in the following language: "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uniform, and operates precisely alike in every port of the United States where such passengers can be landed," and a tax "is not wanting in such uniformity, because the thing taxed is not equally distributed in all parts of the United States,"[3] Again, in the very recent case of Knowlton v. Moore,[4] the Supreme Court were called upon to construe this section in relation to the United States Inheritance Tax law, in the War Revenue Act of 1898. The subject of this tax is legacies or distributive shares arising from personal property, the basis of valuation being the amount of each separate legacy, not the whole amount of the personalty. The minimum exemption is $10,000, with the rate progressive on amounts of legacies in excess of $10,000, i. e. increasing more rapidly than the base increases. The Court refused to hold this progressive rate feature unconstitutional as being repugnant to the fundamental principles of equality and justice. In this case the specific contention was made that this provision of the Federal Constitution prohibits the levy of any duty, impost or excise which does not operate intrinsically uniform and equal upon individuals. By a most elaborate reference to history, in respect to both theory and practice in taxation, the Court reject the conception of a limitation on the taxing power, by this section, which would require that a tax must operate upon individuals with inherent uniformity and equality. The Court hold that the uniformity required is geographical, i. e. according to the same plan and the same method in operation throughout the United States. The expression "uniform throughout the United States" is said to have a synonym in the phrase

(1) Plehn, Public Finance, p. 148.
(2) 112 U. S., 580-94.
(3) State R. R. Tax Cases, 92 U. S. 575-612.
(4) 20 Sup. Ct. 747.

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"to operate generally throughout the United States," in use during the period of the Confederation.

It has been supposed that the Fourteenth Amendment to the Federal Constitution required equal and uniform taxation. Nothing, however, appears in the decisions to give countenance to this view. In the case of Magoun v. Illinois Trust and Savings Bank,[1] it was claimed that the progressive rate feature of the Illinois Inheritance Tax Law was a denial of due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment. In holding both these contentions untenable the Court say: "Generally it has been said that it (Art. 14) only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

It is perhaps properly said that the clause forbidding any State from abridging "the privileges and immunities of citizens of the United States" impliedly secures protection from State taxation which discriminates arbitrarily against the citizens of other States.[2] In Bell's Gap Ry. Co. v. Pennsylvania,[3] the Court speaking through Mr. Justice Bradley says: "The Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation."[4]

2. The provisions of several State constitutions, expressed in varying language, seem to be intended to apply to the intrinsic nature of the tax and its operation upon individuals. As has been seen, the settled construction of the words "uniform throughout the United States," as contained in the Federal Constitution, fixes a different signification as to Federal taxes. The adoption by many States of the inheritance tax, direct or collateral, in recent years has repeatedly raised the question, under State constitutional provisions. Since cases made to test the legacy laws are fairly illustrative of the interpretation as to the rules of equality and uniformity, the rest of this discussion will be mainly devoted to their consideration.

In only four States have inheritance tax laws been held unconstitutional, namely, New Hampshire, Ohio, Minnesota, and Wisconsin. In the two latter States, however, the laws contained unusual provisions, the taxes being more in the nature of probate duties rather than succession taxes, and an arbitrary payment was made a condition precedent to the settlement of the estate. In Minnesota, the law required such a payment, except on estates of less than $2,000, which were entirely exempt. Under the Statute, for instance, an estate of $500,000 paid $1,000 tax, while one of $500,001, only one dollar in excess of the former, paid $5,000 tax. The Constitution declares that

(1) 170 U. S. 283-93.
(2) Ward v. Maryland, 12 Wall 418-30; Guy v. Baltimore, 100 U. S. 434-39.
(3) 134 U. S. 232-37.
(4) See 47 Atl. (Conn.) 299-309.

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"all taxes to be raised in this State shall be as nearly equal as may be."[1] and that "every person ought to obtain justice freely and without purchase."[2] The Court held the act unconstitutional as in violation of both these sections. While the inequality in the distribution of the charge is manifest, yet the Court do not rely upon that ground alone, and for that reason the case is not a strong authority for the equality rule in taxation.[3] In Wisconsin the tax was declared invalid, primarily because it applied to one county only, yet the Court seem to intimate that it might have been held invalid as unequal, because it exempted small estates.[4] New Hampshire, however, and possibly Ohio (whose former law as to direct inheritances will hereafter be considered) seem to have held the inheritance tax laws unconstitutional for reasons which would apply to inheritance taxes in general. The New Hampshire statute imposed a tax of 1% on the value of all inherited estates except those passing to husband or wife, children, or grandchildren of the decedent. The law was held to conflict with the provisions: (1) which limited the power of levying taxes to "proportional and reasonable assessments, rates, and taxes upon all the inhabitants and residents within the State, and upon estates within the same"; and (2) the clause of the bill of rights declaring every inhabitant bound to contribute his share. The same principle of equality and due proportion is said to apply to *every species* of tax alike.[5]

In Virginia and Maryland under constitutional restrictions much more explicit than in New Hampshire and Minnesota the inheritance tax laws have been upheld. In these States the rule of uniformity has been limited to the general property tax. Virginia's Constitution prescribes "that taxation shall be equal and uniform throughout the Commonwealth." While the Court say in so many words that this language is broad enough to cover everything, yet neither the classification of estates according to values, nor the exemption of small estates were considered features in any way repugnant to the Constitutional rule of equality and uniformity. The Court sustains its view in this language: "The tax is equal and uniform throughout the State as far as it is susceptible of the application of the rule. It is the same everywhere upon the succession of estates of equal value of whatever subjects they may consist." And again, "The legislature may define the class to which this tax shall be restricted as they in their discretion may think just and proper, taking care to render it uniform as to all those who constitute the class."[6] In like manner, the Maryland Court of Appeals decided that while the constitution provided for a uniform rule of taxation on property, it was not intended to prohibit any other species or

(1) Art. 9, sec. 2.
(2) Art. 1, sec. 8.
(3) State v. Gorman, 40 Minn. 232.
(4) State v. Mann, 76 Wisconsin, 469.
(5) Curry v. Spencer, 61 N. H. 624.
(6) Eyre v. Jacob, 14 Grattan 422-36.

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mode of taxation.[1] So far as the rule of equality and uniformity is involved, the courts of last resort in North Carolina,[2] New York,[3] and Michigan[4] are in entire accord with the above decisions sustaining the inheritance tax laws. In a recent well-considered Connecticut case, the equality rule was drawn in question as applied to a law taxing corporate stock owned by non-resident stockholders. The statutes declared that shares of capital stock in insurance companies owned by residents should be assessed at their market value, in the town in which the shareholder resides, but so much of the capital stock as is invested in real estate, on which the corporation is assessed and pays a tax shall be deducted from the market value of its stock in its return to the assessor, and that insurance companies shall pay a tax of 1½% on the market value of their shares which are held by non-resident shareholders. Its constitutionality was resisted on the ground that the tax was not equal and uniform. The contention that some theory of uniformity and equality in taxation constituted a limitation on the legislative power and enforceable by the judiciary, was distinctly rejected.[5]

3. In Ohio, uniformity and equality was considered in its relation to the direct inheritance tax law of 1894. This provided for exemption from taxation, of the right to succeed to estates not exceeding $20,000 in value, and taxed the *whole right* to receive estates which exceed $20,000 in value at 1%, with a progressive rate for larger sums by stages. The Supreme Court held the tax unconstitutional as in violation of equality in taxation and the equal protection and benefit of the people.[6] Ohio's constitution requires that, when property is chosen as the basis of a tax, the law shall operate "by a uniform rule."[7] The bill of rights reads: "All political power is inherent in the people. Government is instituted for their equal protection and benefit" (sec. 2). The direct inheritance tax law was said to conflict with this section, because the sum of $20,000 (i. e. the exemption) was not to be deducted from *all taxable amounts*, so that the privilege to take $20,000 was entirely exempt, but the privilege to succeed to an amount exceeding that, say $30,000, was taxed 1% on the *whole amount*; also, because of the progressive rate feature.

Some doubt has been expressed as to the correctness of this decision, and, as I shall attempt to point out, with much reason. The settled rule of constitutional construction with reference to the taxing power in Ohio appears to be that the general grant of legislative power[8] includes the power of taxation in all its forms without limita-

(1) Tyson v. State, 28 Md. 577.
(2) Pullen v. Commissioners, 66 N. C. 361.
(3) Matter v. McPherson, 104 N. Y. 306.
(4) 7 Detroit Legal News, 597, Union Trust Co. v. Durfee, Jan., 1901.
(5) State v. Travelers Ins. Co., 47 Atl. (Conn.) 299.
(6) State v. Ferris, 53 O. S. 314.
(7) Sec. 2, art. 12.
(8) Sec. 1, art. 2, const.

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tion; and that the section requiring all real and personal property (except specified exemptions) to be taxed "by a uniform rule"[1] is a limitation upon the taxing power.[2] Therefore, it follows that property is not the sole basis of taxation under the general grant of legislative power, and the "uniform rule" clause is a limitation on the power to tax property, not on the power to tax rights, privileges, and franchises. The tax in question, being construed by the Court to be one, not on property, but on the right to receive property, i. e. the privilege of succession, was held by the court not to be within the "uniform rule" limitation of Art. 12, Sec. 2. What is the precise ground, then, upon which the Court base their decision against its constitutionality? So far as the decision rests upon an objection to the progressive rate feature of the law, it would seem clearly to conflict with economic principle and judicial authority. For to say that the "rate per centum must be the same on all estates," large or small, is simply to assume as an express provision of our constitution, that which is not to be found therein. It should be observed that the question for the Court was, not what would be *equitable* but what is *constitutional?* The sole ground, therefore, upon which the decision rests is the alleged conflict with the "equal protection and benefit" clause of the bill of rights. The Court admits, however, that this clause is practically a synonym with the "equal protection of the laws" clause of the Federal Constitution and implies no greater restriction than the Federal requirement. Yet the Supreme Court of the United States has decided that the legacy tax law with $10,000 exemption instead of $20,000 as in Ohio did not deny to any person the equal protection of the laws. Moreover, many State Courts under similar constitutional provisions are against the view taken in Ohio.[3] If exemptions are permissible at all, what is the essential difference in principle between one for $10,000 and $20,000? Does it not seem to follow that the Act in question was declared invalid on questionable ground and against the weight of authority? If this view be correct, it is to be regretted that our Supreme Court has so enlarged the construction of section two of the bill of rights as manifestly to hamper the legislature in the imposition of reasonable taxes like the inheritance tax.[4]

The decision in State v. Ferris, 53 O. S., 314, caused the legislature to use abundant caution in framing an amendment to the collateral inheritance tax law (91 O. L. 169). As amended this Act taxes the privilege of succession to all property that passes to collateral heirs or strangers at the rate of 5% on the value, and exempts the first $200, which amount is exempted by the constitution in laws operating

(1) Sec. 2, art. 12.
(2) West. Un. Tel. Co. v. Mayer, 28 O. S. 521; State v. Ferris, 53 O. S. 314, 327, 331.
(3) Magoun v. Ill. Tr. & Sav. Bk., 170 U. S. 283-8.
(4) 4 Columbia College Studies in History, Economics, and Law, No. 2.

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as taxes upon property.[1] In this case it was contended that section 2, art. 12 of the constitution required, by implication, that all taxes must be equal and uniform. The Court, however, reject this view and sustain the constitutionality of the Act. The Court distinguished it from the direct inheritance tax law under review in State v. Ferris, in respect to the exemption feature.

The authorities may fairly be said to support the following conclusions. However desirable it may be to attain exact equality of taxation, yet the Courts are not empowered to define some theory of equality and impose it upon the legislature. If they were, under present accepted standards of policy in taxation, the functions of the legislature would suffer complete paralysis and the operations of government come to a stop. If the legislature acts within the limits of its power, the Courts cannot relieve against mere oppression; legislative action is not invalid because of unequal results. Hence as Judge Cooley says: "A tax cannot be attacked on averment and proof that some other tax would have been more just and equal."[2] If a tax law operates with substantially the same effect upon every person in the same or similar circumstances, then the constitutional rule of uniformity is satisfied. Yet the power to tax is not without limit. The Courts may "interfere and check what can only be looked upon as ruthless exaction . . . An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen." Therefore, if the inequality is so great, that confiscation, in the name of taxation, results, then the legislature has overstepped its authority.[3]

The constitutional mode provided for security against most inequalities of taxation is found, as Chief Justice Marshall has long since said, "in the structure of the government itself."[4] The ballot-box is the main remedy for injustice in the exercise of this most searching incident to sovereignty, the taxing power. In general, whether a tax law operates justly and equally is a legislative, not a judicial question. In conclusion, it is submitted that the adjudged cases sustain Judge Cooley in the following observation: "The State Constitutions have been very specific, though in providing for equality and uniformity they have done little more than state in concise language a principle of Constitutional Law which, whether declared or not, would inhere in the power to tax."[5]

(1) Hagerty v. State, 55 O. S. 613.
(2) Cooley, Taxation, p. 125, 160-3.
(3) Cooley, Const. Lim., 599; Taxation, 128.
(4) McCulloch v. Maryland, 4 Wheat. 316, 428.
(5) Cooley, Const. Lim. 608.

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Editorial.

The next issue of the JOURNAL will appear in October, 1901.

"Trusts" sometimes make mistakes and in endeavoring to undo their ill-advised actions, we gain considerable light as to the real purpose and object of these modern combinations of capital. On April 3rd, 1901, a suit for equitable relief was brought in the Common Pleas Court of Cuyahoga County by the National Salt Company, a corporation organized under the laws of New Jersey, against the United Salt Co. and its stockholders, of Cleveland, Ohio, for the purpose of having the contract, by which the latter company had been absorbed some year and a half prior thereto by the former company, declared null and void. Although it is true that the petition contains allegations of fraud and misrepresentation in the procurement of the contract, yet the real ground upon which the plaintiff asks for relief is, that the contract was entered into in violation of the anti-trust laws of Ohio and for the purpose and intention of restricting the trade in salt, controlling the price of the same, and to prevent competition.

This is certainly a frank and very unique admission on the part of a "trust," although it has been generally known and believed that no "trust" was ever organized for any other purpose. The petition further says "that in order to conceal the real object and purpose of the

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transaction and for the purpose of avoiding the anti-trust laws of the State of Ohio, and to avoid the appearance of corporate action, the parties agreed among themselves that the transaction should take the form of a purchase and sale," although the actual agreement was one "by which the plaintiff and defendants agreed to pool, combine and unite within the State of Ohio their said interests" in order to increase and decrease the price of salt at will.

This strenuous effort on the part of the National Salt Company to conform with the laws of this State would indeed be commendable, were it not for the fact that not many months before, this same company had knowingly and purposely violated these same laws. That a soulless corporation felt the prick of conscience and decided to turn from its wicked ways, is not to be believed by the most credulous. The real reason for this sudden assumption of righteousness is found in the fact that the bargain was not a good one for the National Salt Co. for three reasons: first, the property of the United Salt Co. was taken at too high a valuation; second, The United Salt Co. had many outstanding contracts which the "trust" refused to carry out at the agreed prices, and heavy damages were likely to result; and third, competition had not been so thoroughly stifled as had been expected, and consequently the chance of realizing the anticipated profits was rather dubious.

The legal aspect of the case is also an interesting one, as to whether a court of equity will release a party from a contract, which was entered into with full knowledge, that it was in violation of the laws of the State, upon the application of that party. A suit by the attorney general would stand upon a different basis. The application of that maxim of equity, which insists upon the plaintiff coming into court with clean hands, would not be inappropriate in this case. How this action is affected, by being brought on the application of two stockholders of the plaintiff company, who claim that they did not assent to the unlawful contract, does not appear. The outcome of this proceeding will undoubtedly be watched by many people, both lawyers and laymen, with deep interest.

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Comments.

Divorce—Jurisdiction—State Comity.—The Supreme Court of the United States has recently held, April 15, 1901, in the cases of Streitwolf v. Streitwolf and Bell v. Bell, that State comity does not compel or require that one State must recognize the validity of a divorce decree secured in another State, because such other State has assumed and taken jurisdiction of the parties, and that the first State may go into the question whether the plaintiff acquired a bona fide domicile in the other State, and if he did not, in the opinion of its court, then said decree may be disregarded in such State. In short, the indispensable requisite for a valid divorce is a bona fide domicile, and each State may determine that question for itself. The public welfare of the State requires that the preservation of the sanctity of the marriage relation of its citizens should not be left to the tender mercies of less scrupulous commonwealths. That a divorce court acquires no jurisdiction, except by a bona fide domicile of the plaintiff, which will be recognized in the State of Ohio, has been decided in Van Fossen v. State, 37 O. S. 317. In this case Van Fossen was prosecuted for bigamy, and as a defence he set up a divorce obtained in Colorado for a marital offence committed while in that State, and put in evidence the laws of Colorado permitting such a divorce, although the parties acquired no domicile in that State. Judge Boynton refused to recognize the validity of the divorce, although the Colorado court had assumed jurisdiction, and the judgment finding the defendant guilty of bigamy was affirmed.

Eminent Domain—New Servitude.—In the case of Coburn v. The New Telephone Company, 59 N. E. 324, decided by the Supreme Court of Indiana, the plaintiff sought to enjoin the telephone company from laying telephone wires under his sidewalk in front of his premises, claiming that it could not rightfully do so without condemnation proceedings and compensation to the plaintiff. The company contended that the laying of the wires was consistent with a proper use of the street, and therefore the plaintiff's land was subject to this easement, and that it imposed no additional burden, and that this being so, the plaintiff was not entitled to compensation. The court sustained the company's contention. In Magee v. Overshinner, 150 Ind. 127, cited by the court, the question was discussed and authorities reviewed. There it was said that anything that facilitates public travel, traffic and communication is consistent with the dedication of the street. With the increase of population in cities, and the consequent crowding of the streets, the public necessities increase, and the use of

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devices which enable citizens to communicate without actual travel, thereby facilitating travel and rendering more convenient the use of the streets, are held to be within the contemplated purpose of their dedication. See also Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258, where it was held that the erection and maintenance of telephone poles in the curb line of a street imposed no additional burden on the owners of abutting property.

The rule announced in this case is far from being generally adhered to and, it is submitted, is not well founded. Since it is true, as announced in Ry. Co. v. Tel. Assn., 48 O. S. 428, that "telephone lines may be placed elsewhere than on the highways and yet accomplish their purpose," it is difficult to understand how a telephone system is a street purpose, and why the streets should be unnecessarily burdened by their presence. In Ohio it has been expressly held in Daily v. State, 51 O. S. 348, that a telephone company has no right to appropriate the property rights of adjoining owners in streets, without compensation being first made.

Insurance—Life—Execution for Crime.—An action cannot be maintained on a policy of insurance on the life of a person, who has been convicted by a court of competent jurisdiction of a capital crime and executed pursuant to its sentence, although it is alleged that such conviction was erroneous and the deceased in fact innocent.

Burt v. Life Ins. Co., 105 Fed. 419.

The policy contained no provision for forfeiture in the event of execution for crime. The court holds that this is not necessary, as such a risk could not lawfully be insured against, and any such contract would be void on the ground of public policy. Society v. Bolland, 4 Bligh (N. R.) 194, 211, ("Fauntleroy Case.")

By the demurrer, the question whether the innocence of the insured should alter the liability of the insurance company, was put in issue, and in deciding that it was immaterial, the court said, that such a policy would be against the public good, as it would amount to "legal life insurance against the miscarriage of justice." It would be more proper to state the proposition of law in this form, whether the findings in a criminal case are conclusive, when the same facts are brought in issue in a civil proceeding. As it is clear that they are not, 1 Greenleaf on Evidence, § 537-538, the insured should be entitled to the privilege of showing his innocence and therefore his right to recover on the policy. It violates no rule of public policy to maintain that a man should receive justice in a civil suit, although he has been denied it by a criminal court. McCormick, J., dissents.

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Wills—Revival by Destruction of Second Will.—Held that the destruction of the second will with intent that the first shall govern the disposition of the property, revives the first will without re-publication of the same.

In Re Gould's Will, 47 Atl. (Vt.) 1082.

In England, under the statute of I Vict. c. 26 a re-publication of the first will is necessary. In certain American States, the courts hold the same way, without any such statutory requirement. Bohanon v. Walcott, 1 How. (Miss.) 336; Harwell v. Tively, 30 Ga. 315; Hawes v. Nicholas, 72 Tex. 481; Scott v. Fink, 45 Mich. 241; Stewart v. Mulholland, 88 Ky. 38. The contrary position is adopted in many States, to-wit, that the second or revoking will has no operative effect until the death of the testator and "until that event the revocation is ambulatory" and upon the destruction of the second will, the first remains in full force. Peck's Appeal, 50 Conn. 562; Randall v. Beatty, 31 N. J. E. 643. It is held by some courts, however, that a presumption of validity of the prior will does not arise *ipso facto* from the destruction of the second will, but that it is necessary that affirmative evidence be offered to show an intention to revive the prior will. McClure v. McClure, 86 Tenn. 173. This rule is approved and adopted by the Vermont court, in the case under discussion. The more extreme position, that the destruction of the subsequent will leaves the prior will as if the second will had never existed, is maintained in Flintham v. Bradford, 10 Pa. St. 82 and in Colvin v. Warford, 20 Md. 391, and in Cheever v. North, 106 Mich. 390, unless the subsequent will *expressly* revokes the prior will. In Ohio the rule is statutory. Section 5960 of the Revised Statutes provides that the destruction or revocation of the second will does not revive the first, "unless it appear by the *terms* of such revocation that it was his intention to revive and give effect to his first will; or unless, after such destruction, canceling or revocation, he shall duly re-publish his first will."

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Recent Cases.

CARRIERS—LOSS OF BAGGAGE—Plaintiff purchased a ticket and had his trunk checked, but did not use, nor intend to use the ticket at that time. The trunk was broken open by burglars while in possession of the defendant railway. Held, that the defendant was merely a gratuitous bailee and only liable for gross negligence.

Marshall v. Railway Co., 85 N. W. (Mich.) 242.

The authorities hold that the right to have baggage transported, which a passenger acquires by purchasing a ticket, is merely incidental to the passenger transportation and is conditioned upon it. Wilson v. Railway Co., 56 Me. 60; Hutch on Carriers, §702. Unless the passenger accompanies the baggage, the railroad receives no compensation and is therefore a gratuitous bailee. The court, however, in this case, is not willing to accept the logical result of this rule and hold that it is absolutely necessary for the passenger to go on the same train with his baggage. It takes the position that a bona fide intention is sufficient, where the passenger is prevented from going without his fault and takes the next train.

CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION—A chattel mortgage on growing wheat, which described the land as 340 acres of wheat now in possession of the mortgagor in M. county, did not specify the township, range or section. Defendant, in good faith, purchased the wheat from the mortgagor. Plaintiff sued in conversion and defendant relies upon the insufficiency of the description contained in the record of the chattel mortgage. Held, that the indefiniteness of the instrument imposed too great a burden upon buyers, in that it compelled them to ascertain what realty the mortgagor was possessed of before they could safely purchase.

Com. State Bank v. Interstate Co., 85 N. W. (S. D.) 219.

CONSTITUTIONAL LAW — HABITUAL CRIMINAL ACT—EX POST FACTO — A Massachusetts statute provided that anyone twice convicted of a crime and sentenced for it to three years imprisonment was an habitual criminal, and increased the punishment for felony on proof that the offender was such habitual criminal. Defendant was convicted of felony and proven to have been formerly convicted twice, and the increased punishment was imposed on him as an habitual criminal. On error, the defendant contended the law was unconstitutional as being an ex post facto law. Held: Constitutional.

McDonald v. Commonwealth, 21 Sup. Ct. (U. S.) Rep. 389.

The statute does not impose an additional punishment on the former crimes for which a conviction has already been had; it is the subsequent offence that is punished and it was committed with constructive if not actual notice of what the punishment might be. Gray, J., in the opinion, says: "The punishment is for the new crime only, but is the heavier, if he is an habitual criminal." Rand v. Com., 9 Grat. (Va.) 738.

CONSTITUTIONAL LAW — INSURANCE—Section 3625 of the Revised Statutes of Ohio provides that "no answer made by an applicant in his application for a policy, shall bar the right to recover on the same, unless it be clearly proved that such answer is wilfully false and was fraudlently made." Held, that the legislature has power to impose reasonable conditions and restrictions on the transaction of life insurance business, and that the act is constitutional.

John Hancock Ins. Co. v. Warren, 21 Sup. (U. S.) Ct. 535.

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It was urged that life insurance business was a matter of private right and no reason of public policy existed for interfering with the same by statutory regulations. This private right involves so many questions of public concern that it has become a franchise, or privilege, which the state may confer, upon such conditions as it deems necessary for the public protection. Hence, when a corporation solicits business in such a state, it must be subject to the conditions and restrictions imposed. The decision of the Supreme Court of Ohio, 59 O. S. 45, is affirmed. The right to control the conditions upon which the company is permitted to do business, State v. Ackerman, 51 O. S. 163, and the right of the legislature to say that certain terms and conditions shall be read into all policies, Insurance Co. v. Leslie, 47 O. S. 409, have been thoroughly recognized in this state.

CRIMINAL LAW—BURDEN OF PROOF—INTOXICATION—The defendant was convicted of shooting with intent to wound; the court instructing the jury that intoxication was not a defence, unless the defendant could satisfy the jury that he was so intoxicated as to be mentally incapable of forming an intent. Instruction held to be error.

Howell v. State, 85 N. W. (Neb.) 289.

The courts in Nebraska follow that line of decisions which hold that the burden of proof is on the state, when the defendant sets up insanity as a defence. Wright v. People, 4 Neb. 407; Ballard v. State, 28 N. W. (Neb.) 271. As the defence of intoxication rests upon the theory that the reason has been so far dethroned that the defendant is unable to discriminate between right and wrong and incapable of forming an intent, this case is perfectly consistent with the other decisions. In Ohio insanity is an affirmative defence, which the defendant must show by a preponderance of the proof. Kelch v. State, 55 O. S. 146. It would seem, therefore, that in this state intoxication must be affirmatively made out by the accused by a preponderance of the proof, for the reason that it is not recognized as a defence unless the intoxication amounts to temporary insanity. There is no decision, however, on this question of burden of proof, although the defence has been recognized in Pigman v. State, 14 O. 555; Davis v. State, 25 O. S. 369; Cline v. State, 43 O. S. 332, and a number of other cases.

DAMAGES—BREACH OF WARRANTY—Held, that one purchasing a threshing machine with warranty may accept and retain it, and yet recoup against the agreed purchase price such damages as its defective condition imposes on him without negligence on his part, and of such character are wastage of time of himself and threshing crew in effort to use the machine, on the seller's solicitation, that he do so, the value of his time in reasonable efforts to remedy the defects, and the hire of another machine for a few days to accomplish the work for which, had the machine bought been as warranted, it would have served.

Optenberg v. Skeleton, 85 N. W. (Wis.) 356.

DAMAGES—MENTAL ANGUISH—Action for damages for mental anguish caused by a delay in delivering a telegram informing plaintiff of the death of his grandmother. Held, that the rule established by the Supreme Court of Indiana allowing recovery in such case is wrong; and the appellate court certified the case to the Supreme Court recommending a holding in conformity with this opinion.

W. U. Tel. Co. v. Ferguson, 59 N. E. (Ind. App. Ct.) 416.

Reese v. Telegraph Co., 123 Ind. 294, laid down the rule that a recovery may be had for mental anguish alone, unaccompanied by bodily injury, and has

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been generally followed in that state. But the weight of authority being the other way and the appellate court being of the opinion that the rule laid down in Reese v. Telegraph Co. was not founded on sound reason, certified the case to the Supreme Court for the purpose of giving that court an opportunity to reverse its former holdings. The outcome will be watched with interest. The only other states in the union recognizing the doctrine are Texas, Tennessee, Kentucky, North Carolina and Alabama, and all the decisions are based upon the case of So Relle v. Telegraph Co., 55 Tex. 308.

EMINENT DOMAIN—RESTRICTING HEIGHT OF BUILDINGS—An act of the Massachusetts legislature restricted the construction of any building above the height of 70 feet, within certain tract west of the State House in Boston, and permitted the assessment of damages for deprivation of rights existing under the constitution. Held, that as the act provided for compensation of such rights it would not be construed by the court as an exercise of the police power.

Parker v. Commonwealth, 59 N. E. (Mass.) 634.

The right to build is a right under the constitution, i. e., property. The Attorney General insisted that a restriction of this right was an exercise of the police power and that therefore the plaintiff was entitled to no compensation. The court, by Holmes, C. J., held that a proper construction of the act showed that the legislature did not intend to go that far, inasmuch as it had provided for compensation and that therefore the power exercised was that of eminent domain. Had the legislature attempted to make this building restriction without providing for compensation, "such a law would certainly present grave difficulties," and as the question was not raised in this case, no opinion on that point is expressed by the court. The decision clearly shows that the courts will not construe an act which restricts constitutional rights as an exercise of the police power, unless the legislature expressly provides that no compensation shall be paid for the same. No presumption will arise that the legislature intends to take away property and at the same time refuse to pay for the same.

EVIDENCE—INSANITY—GENERAL REPUTATION—Testimony was admitted on the trial, over the objections of plaintiff tending to establish the general reputation of the plaintiff in the community of her residence, for insanity. Held, insanity cannot be established by proof of the reputation of the party in that regard.

Biddle v. Jenkins, 85 N. W. (Neb.) 392.

LARCENY — OVERPAYMENT BY MISTAKE — SUBSEQUENT INTENTION TO APPROPRIATE — Held, that where one has received overpayment by mistake and afterwards converts the excess to his own use, is not guilty of larceny unless he knew of the overpayment at the time it was made and then had the intention to convert the same.

Cooper v. Commonwealth, 60 S. W. (Ky.) 938.

LIBEL — BAD-PAY LISTS—Defendant was a member of an organization of merchants, among whom circulated a list of persons who failed to pay their debts. Defendant procured the insertion of plaintiff's name in this list, notwithstanding that no debt was in fact owing from plaintiff to defendant. Defendant at the time mistakenly believed that the plaintiff was indebted to him. The defendant was held liable.

Werner v. Vogeli, 63 Pac. (Kansas) Rep. 607.

While the report does not disclose the exact ground of defence, it is presumed that the claim of privileged communications would be relied on under the state of facts. The publication complained of does not seem capable of

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being brought within the doctrine of those cases where the defence was allowed. A leading case is that of Taylor v. Church, 1 E. D. Smith (N. Y.) 279, where it was stated that in order to allow the defence of privileged communication to an action of libel it must appear that there was a reasonable occasion or exigency which for the common convenience and welfare of society fairly warranted the communication as made, and that such communication must be made by and to a person having an interest. On this principle, mercantile agencies have been held liable for false statements made generally to their patrons, a very small number of whom would have the requisite degree of interest to prevent liability.

NEGLIGENCE — FIRE ESCAPES — ASSUMPTION OF RISK — PROXIMATE CAUSE — The plaintiff's intestate was a seventeen-year-old girl, and came to her death during a fire in attempting to escape from a burning building. The building was not provided with the number of fire escapes required by the statutes of Illinois. The trial judge directed the jury to find for the defendants. This is held to be error.

Landgraf v. Kuh, 59 N. E. (Ill.) 501.

The question whether the proximate cause of the girl's death was the lack of sufficient fire escapes was held to be one that should be submitted to the jury. On behalf of the defendants, it was urged that the employe in accepting service with knowledge of the lack of fire escapes required by law, assumed the risk. As a matter of law, the court denied that "the absence of such fire escapes was a natural and ordinary risk, incident to the work in which she was engaged," but added that it certainly was a question of fact for the jury. The doctrine of assumption of risk does not go so far as to hold that such risks are assumed, "as would result from a violation by the employer of a statute of the state." Huda v. Glucose Co., 154 N. Y. 474; 1 Shear & R. Neg. § 217.

MASTER AND SERVANT — ASSUMED RISK—SETSCREW—Where a setscrew can be readily seen and the danger resulting from the revolving shaft is consequently apparent, the risk is assumed.

Demers v. Marshall, 59 N. E. (Mass.) 454.

It was urged that projecting setscrews are no longer a well recognized device for holding collars onto shafts and that the defendant should have provided a safer substitute, but the court held, that the "defendant was not bound to change the setscrew or point it out to the plaintiff," as they are still commonly used in many modern establishments. Ford v. Pulp Co., 172 Mass. 544.

MASTER AND SERVANT—FELLOW SERVANT RULE—ASSUMPTION OF RISK —The plaintiff in this case was a section hand employed by defendant company. While engaged in unloading ties from a freight car he was injured by the negligence of a fellow servant. The judgment below was for the defendant on the ground that plaintiff being injured by a fellow servant could not recover and that since he knew that said fellow servant was reckless and incompetent, he must be deemed to have assumed the risk of injury from him. The court further charged that if the defendant had equal facilities with the principal for finding out the incompetency of the fellow servant or by the exercise of due care could have discovered that fact, he cannot recover. Held, that this was an erroneous instruction.

Lawrence v. Railway Co., 61 S. W. (Texas) 342.

A servant does not assume the risk arising from the employment of incompetent workmen, unless he has full knowledge of that fact. There was evidence tending to show that the fellow servant was reckless and incompetent. Had plaintiff known that fact and without complaint continued to work with him, he must be deemed to have assumed the risk of injury from him. But there is

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no obligation on an employe to investigate the character of his fellow workman; and the fact that his facilities for determining said fellow servant's character are as great as those of the master, or the fact that by the exercise of ordinary care he might have determined said character, does not in the absence of absolute knowledge on his part raise any such obligation. The servant has a right to presume that his master will not put him to work with an incompetent fellow servant.

MASTER AND SERVANT — SCOPE OF AUTHORITY—Where children, who broke an ax belonging to the defendant, in the absence of the defendant's servant, were injured by the punishment inflicted on them by the servant on his return, defendant is not liable therefor, as such punishment was not within the scope of the servant's duty in protecting the master's tools.

Brown v. Boston Ice Co., 59 N. E. (Mass.) 644.

In order to bring the act of the servant within the scope of his employment, it was urged that the punishment of the children would tend to render the property of the ice company more secure in the future. The court emphatically held, that chastisement for past acts to prevent future injury, was not within the scope of the servant's employment and therefore the defendant was not liable. Bowler v. O'Connell, 162 Mass. 319.

NEGLIGENCE -DANGEROUS MACHINERY—ATTRACTIVENESS TO CHILDREN—A winch used by defendant in the construction of a sewer in a public street was left unguarded and while the plaintiff and other children were playing around it the plaintiff fell from the winch and was injured. Held, that an action for injuries cannot be sustained, for the machine was not of itself dangerous, or of such character as would allure children to play with it, both of which elements must be present in order to make the defendant liable on the ground of negligence.

Fitzgerald v. Rodgers, 68 N. Y. S. 946.

The machine in this instance was no more a temptation to children than if it had been left on private premises, and this being so the rule established by the turn table cases in Walsh v. Railroad Co., 145 N. Y. 301, and Daniels v. Railroad Co., 154 Mass. 349, is not applicable.

NEGLIGENCE—DUTY OF CARE TO LICENSEE—The plaintiff, having no business with the defendant railway company, went upon its tracks and stationed himself just behind a caboose to which was attached some of defendant's cars. Defendant's employes, having no knowledge of plaintiff's presence, ran a number of cars with considerable violence against the caboose, causing it to run upon and injure plaintiff. The point at which the accident occurred was in front of a depot where persons were accustomed, to defendant's knowledge, to pass over the tracks in going to and from defendant's passenger trains. Held, that the company owed a duty to the public to see that persons were out of the way before moving its trains at such places, and that mere ignorance of plaintiff's presence was no defence.

Fleming v. L. & N. R. R., 61 S. W. (Tenn.) 58.

NEGLIGENCE—MENTAL ANGUISH—Held, that where a telegram is not delivered through negligence of the defendants, whereby plaintiffs are prevented from recovering the body of their son, the mental sufferings of the father and mother are sufficient to warrant a verdict of $1000, and that changing the spelling of a proper name in the transmission of the telegram, i. e., Norris to Nortys, is prima facie evidence of negligence.

Western Union Tel. Co. v. Norris, 60 S. W. (Texas) 682.

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NEGLIGENCE — RAILROAD CROSSING — ACCIDENT—Failure on the part of the railway company to comply with statutory regulations as to the speed of its trains in running through a village or failure to signal the approach thereof to a street crossing, constitutes negligence *per se*, but does not excuse the plaintiff from exercising the ordinary care of looking and listening in approaching such crossing, and is not actionable where the plaintiff fails to do so.

Brown v. Railway Co., 85 N. W. (Wis.) 271.

RELIGIOUS SOCIETIES — EXPULSION OF A MEMBER—The plaintiff was a member of a certain religious society and was expelled by a vote of the congregation; thereupon he appealed to the quarterly conference, where by the organic law of the society he was entitled to be tried by a tribunal of five, two to be selected by himself and two by the quarterly conference and the fifth by the four; but no person was qualified to sit as a member of this tribunal who had taken part in the original trial. The defendants, who constituted the quarterly conference, selected two men to act, who had sat in judgment at the original trial. Held, that an injunction would lie preventing these two men from acting and restraining the defendants from proceeding until two eligible persons should be selected.

Hatfield v. DeLong, 59 N. E. (Ind.) 483.

As no property or civil rights of the plaintiff were at stake, the court did not interfere with the decision of the religious society on that ground, although that right is well recognized. Goff v. Geer, 88 Ind. 122; Jennings v. Scarborough, 56 N. J. L. 401. If the subject of the controversy is one of doctrine and discipline, the decision of the spiritual court is final and will be accepted as conclusive by the secular courts. Grimes' Executors v. Harmon, 35 Ind. 198, 254; Shannon v. Frost, 42 Ky. 253, provided the acts of the society have been taken in conformity with the organic law of the church. If such is not the case, the secular courts will take jurisdiction and enjoin any unconstitutional step. Bouldin v. Alexander, 15 Wall 131; Fitzgerald v. Robinson, 112 Mass. 371.

SALES — WARRANTY — BREACH — RESCISSION—The plaintiff by letter agreed to sell and the defendant to buy an automatic rotary polishing machine. There was no express warranty in the contract. The machine was delivered to the defendant and set up, but found unsatisfactory after repeated trials. The defendant refused to pay for the machine and returned the same, but plaintiff refused to accept it and brought an action. Held, the defendant could not rescind the sale and return the machine for a mere breach of warranty in the absence of an agreement to that effect.

Worcester Mfg. Co. v. Waterbury Brass Co., 48 Atl. (Conn.) 422.

The defendant received the precise article contracted for and upon its acceptance, title passed to him. The contract contained no express warranty or agreement to allow the return of the machine if unsatisfactory. The court held that even if a warranty had been made, it could not be treated as a condition and the contract rescinded after title had passed. The decision follows that line of cases which hold that in the sale of specific articles a warranty cannot be made available as a condition after the goods have been accepted. Behn v. Burness, 3 Best. & S. 751; Merriman v. Chapman, 32 Conn. 145; Benjamin on Sales, §647-57 and §634-38; Briggs v. Hilton, 99 N. Y. 529.

WILLS — REFUSAL OF GIFT — ACCELERATION OF REMAINDER—A testator devised all his real and personal estate to S. in trust, to hold for the benefit of the testator's widow during her life, and upon her death to distribute the remainder among the testator's children. The widow refused to accept the gift

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and S. refused to make distribution to the children, claiming that their right of enjoyment did not inure until the widow's death. The court held that the widow's refusal to accept accelerated the remainder over, entitling the remaindermen to immediate distribution.

Beideman v. Sparks, 47 Atl. (N. J.) 811.

A similar question was presented in the leading English case of Jull v. Jacobs, L. R. 3 Chancery Division 709, where the particular tenant named in a will was incapacitated from taking a gift by reason of having been an attesting witness to the will. The remaindermen were held entitled to present possession, the court saying that the only reason which the testator could have had for postponing the remaindermen was to permit enjoyment by the particular tenant; such enjoyment having become impossible, it would be unreasonable to defer the remaindermen until the death of the particular tenant. The rule is general that when by forfeiture, incapacity, renunciation, death or other circumstance, the particular estate is destroyed, the remainder over if not contingent will give a present right of possession.

WILLS—RULE IN SHELLEY'S CASE—A devise of land was made to testator's son, A, "to be held by him for his own use during his life and at his death to descend to his children, or, in default of children, to his legal heirs." Upon A's death, his administrators sold the land to pay debts. In an action brought by A's children against the purchaser, held, that the rule in Shelley's Case was applicable and that A had a fee simple estate which was acquired by the purchaser at the administration sale. The court based its decision upon the fact that it plainly appeared to be the testator's intention that the children were to take not from him, but from the first taker, A.

Brinton v. Martin, 47 Atl. (Pa.) 841.

Whatever the rule may be in Pennsylvania, in Ohio the rule in Shelley's Case is differently applied according to whether the instrument is a deed or a will. In its application to grants in deeds, the rule is applied in all its rigor, but it has been held in Turley v. Turley, 11 O. S. 182 (a will case, but arising before the passage of Section 5968 in 1840), that it will not be invoked, where the remainder is limited to the "children" and not to the "heirs." In short, "children" was held to be a word of *purchase* and not of *limitation*. In the construction of wills, it was the intention of the legislature that Section 5968 should forbid the application of the rule in Shelley's Case, where such application would defeat the manifest intention of the testator. Carter v. Reddish, 32 O. S. 1. Therefore in such cases the technical construction usually placed upon the words "heirs" and "children" does not apply, and the intention of the testator must be the real test in each case. Carter v. Reddish, supra; Bunnell v. Evans, 26 O. S. 409. To revert again to the application of the rule in cases of grants in deeds, Judge C. E. Pennewell, in 2 Western Reserve Law Journal, 123, says, "But a grant to A for life and at his decease to his sons, or *children*, or issue, will not be converted by this rule into a fee in the first taker. The general rule is that persons thus described take as purchasers and not by descent."

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